

**Report on Directive 79/7/EEC and Directive  
86/378/ EEC as amended by Directive 96/97/EC**

**Report by the Commission's Network of legal experts  
in the fields of employment, social affairs and  
equality between men and women**

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The information contained in this report reflects, as far as possible, the state of affairs in March 2007.

## **Executive summary**

According to the Roadmap for equality between women and men 2006-2010 it is essential that social protection systems ensure that women have access to adequate benefits, in particular when they retire. In this context the Commission is called upon to assess how social protection systems can promote gender equality and to review the existing EU gender equality legislation not included in the 2005 recast exercise with a view to updating, modernizing and recasting where necessary.

The Commission services have engaged in a reflection on the impact of Directives 79/7/EEC and 86/378/EEC as amended by Directive 96/97/EC and on a possible modernization of the legal framework of these Directives.

The modernization is, in fact, not an entirely new idea. In 1987 a proposal was made by the Commission for a Directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes (COM 9870 494; OJ 1987 C 309/10). This proposal aimed at doing away with the exceptions and exclusion in the existing social security directives. Unfortunately, this proposal was first put on ice and next, it silently disappeared from the agenda.

The national reports included in the present consolidated report start by giving an overview of the social security systems in the EU Member State and the EEA countries. The picture of these systems is very complex since the rules and schemes of the states concerned vary considerably. The purpose of the present summary is not to give a sort of summary of the schemes as they exist but rather to highlight the most important elements from the reports which are relevant for the reflection on the question: how to update, modernize, recast the EU legislation on gender equality in social security.

### **1. The Three Pillars of social security**

A good starting point for this reflection is the three pillar-based approach, i.e. the division into statutory schemes, occupational schemes and private insurance schemes, which are covered by Directive 2004/113.

The distinction between statutory schemes, covered by Directive 79/7 and occupational schemes, covered by Directive 86/378 (as amended by Directive 96/97), which is even more reinforced by the very fact that the ECJ considers occupational pensions as pay under Article 141 TEC, is of great importance. It makes possible a sort of 'strategic' use of these directives and Article 141 TEC, filling the gaps and circumventing the exceptions of, in particular Directive 79/7. Generally speaking, one is better off if the scheme at issue was qualified as occupational since then certain differentiations (or discriminations) are not allowed anymore (e.g. discrimination in relation to survivors benefits and retirement age; also in relation to the use of gender segregated actuarial factors, which are not a problem in statutory schemes, the ECJ 'corrected' to an certain extent the occupational schemes directive).

A vital question for the future is, however, should the new instrument make this distinction between the three pillars and if yes in what respect and how far?

On the basis of the national reports it may be submitted that such a distinction is doubtful, at least. First, this distinction is (and was) problematic for some 'older' Member States, such as France, Greece, Austria, UK, Finland and Denmark. Second, the majority of the 'new' Member States, in particular the post-communist States, had to restructure their social security system. Some of them have introduced a three pillar structure, but these are different pillars when compared to the Community framework. Their model follows the distinction in state schemes, mandatory savings schemes and voluntary schemes, the so-called 'World Bank Model'. It may also happen that there are other reasons why the national structure of social security just does not fit the Community division.

It is submitted that, instead of (extremely) complicating the debate about the three pillars and trying to differentiate to what extent should the various schemes – statutory, occupational, private – be made gender discrimination proof, one should rather concentrate to eradicate gender discrimination in all three pillars as a matter of principle. The pillar distinction should not be regarded as relevant for that purpose.

Another question is, in how far is such an eradication of gender discrimination from all the three sorts of schemes feasible. In this respect, it may be useful to look into five key problem areas.

## **2. Family benefits and survivors' benefits**

Family benefits and survivors' benefits are not within the scope of Directive 79/9, so in this respect, the prohibition of discrimination under EC law does not apply. As far as these benefits are covered by occupational schemes, as a result of the jurisprudence of the ECJ they have to be abolished in principle.

In most of the Member States and EEA countries, discrimination in the area of family and survivor's benefits has been abolished, in statutory schemes independently of EC law requirements. In two member states a transitional regime exists for the introduction of equality in this area (Germany and Sweden). The only Member State where the benefits are not entirely equalized yet is Cyprus. In Greece the situation is rather complex, as there exist under certain schemes benefits for dependent wives but not husbands. Some of these benefits are or have been declared unconstitutional, but despite that they are still applied.

Considered against this background introduction of full gender equality in the field of family and survivor's benefits does not look as a 'mission impossible'.

## **3. Social assistance**

Social assistance is partially excluded from the scope of Directive 79/7. Only where it intends to supplement or replace the statutory schemes, the prohibition of discrimination laid down in that Directive applies.

Should social assistance be included into the scope of a new recast directive? A number of reasons can be brought forward in favour of such an proposal.

First, the distinction operated by the directive is not always easy to make in practice, as transpires from a number of reports. Second, the social assistance schemes are - overall - gender neutral. An exception to this is the fact that a means test, which seems to exist in quite some of the schemes (though it has different modalities) may amount to indirect discrimination. However, it is to be expected that the means test will be objectively justified is submitted to the courts, ECJ included.

The social assistance schemes are also gender neutral in the sense that men and women are treated equally badly, i.e. that often the level of the benefits is low.

This brings us to the next issue which is very clearly made in various national reports, namely that the problem is elsewhere than in discrimination in social assistance as such. Due to their career pattern, employment record etc. (for instance part-time jobs, atypical employment; career-breaks due to upbringing of children) women qualify less often for social security and have to fall back upon social assistance more often than men do. Thresholds of minimum hours of employment per week, minimum number of years of employment or whatever they may be will, sometimes more sometimes less, work at the detriment of women. In other terms, the potential discrimination (indirect one) lies in the qualification criteria for social security schemes. However, these will be probably often justified.

For the purposes of the recast directive, the central question is whether legislation that aims at eradication discrimination from the social security and social assistance schemes is the proper place for addressing this problem. Partly, this is the consequence of much broader labour market problem. For another part, it should be stressed that addressing the above mentioned problem would imply an intervention into the structure of the schemes and in particular the conditions of social security, which is traditionally an area where the Member States enjoy a broad margin of discretion. On the other hand, as the following sections shows, there are modalities of rules that may certainly help women (and men) to qualify for social security despite certain career breaks.

## **4. Taking into account periods of caring**

Article 7 (1) (b) of Directive 79/7 contains a derogation from the principle of equal treatment 'in respect of old-age pension schemes granted to persons who have brought up children' and 'the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children.'

From the national reports it transpires that there is a whole panoply of these 'advantages' that relate to the fact that women or more often one of the parents has engaged in bringing up children.

They can take form of qualifying periods, i.e. periods on leave that nevertheless count for the purposes of (certain type of) social security, various bonuses or /notional contributions. Much depends on the national scheme at issues.

The majority of the countries concerned seem to opt for gender neutral advantages in this respect.

In France, the advantages have been equalized after litigation, but there exist complex transitory schemes.

In some countries there are presumptions in favour of women (Czech Republic, Germany, Italy) or women only may benefit (Cyprus and Slovenia, in respect of compulsory pension and invalidity insurance), or women, in the first place, are entitled to a service/pension credit and if they make no use of it, the father may benefit from it, provided that he is insured with the same scheme (Greece).

While in Lithuania, the advantages in respect of old-age pension schemes are gender neutral, with one exception in favour of women who have brought up and raised, until the age of eight years, seven or more children.

On the basis of this it could be concluded that this derogation of Directive 79/7 could be abolished and that in principle both men and women should qualify for this type of advantages. An appropriate transitory regime may be necessary in some countries.

However, there is also another option: the question may be posed whether an obligation to take the periods of children upbringing into account should be created as a matter of Community law for the purposes of social security. This is typically a policy issue, which needs further reflection, last but not least for its possible negative effects, in the sense that it may reinforce the women's traditional role in child upbringing and caring.

## **5. Retirement – pensionable - age<sup>1</sup>**

In the area of occupational schemes, in many countries traditional difference in pensionable age is put under pressure by ECJ. In principle, differences are not allowed unless there is a close link with statutory schemes. Under statutory schemes, the difference in age is allowed under Article 7(a) of Directive 79/7.

The overall picture in the statutory schemes in the Member States and the EEA countries is as follows:

- In some states there is no difference made in this respect (Cyprus; France; Iceland; Ireland; Liechtenstein (since 2001); NL; Norway; Portugal; Sweden; Luxembourg; Spain);
- In other states there is a process of equalizing the pensionable age, sometimes with long transitional arrangements (Austria, Belgium; UK (transitional measures until 2020); Estonia; Germany; Latvia; Malta; Slovakia; Hungary);
- In the remaining states the difference in pensionable age is maintained (Bulgaria, Czech Republic (if a woman has brought up children), Italy (difference is in fact reintroduced), Lithuania, Poland, Romania, Slovenia, Greece)

Interestingly, in is in particular the former 'communist' countries that maintain this difference. As an expert put it: the difference is regarded in these countries as just since it compensates for unequal working conditions for men and women.

Considered against this background, if the pensionable age of men and women is going to be equalized under EU-law at the end of the day, an objective to be strived for, due account should be taken of the realities in, in particular the new Member States. Appropriate transitory measures seem inevitable.

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<sup>1</sup> Strictly speaking there is, under ECJ case law, a difference between retirement age in the sense of the age at which women or men have to leave their employment, which must be equal, and the age at which women and men qualify for their old age and related pensions.

## **6. Gender related actuarial factors**

The use of gender related actuarial factors is not an issue under Directive 79/9. The crucial directives here are the directives concerning the second and third pillar, i.e. Directive 86/378/ EEC as amended by Directive 96/97 and Directive 2004/113.

The use of gender related actuarial factors is under certain conditions allowed in both occupational schemes and in private insurance schemes. The problem here is, that these conditions differ, while in certain states, like Belgium, pension funds operate in both sectors.

In the Member States and the EEA countries, an overall look at the occupational schemes gives the following picture:

- The use of unisex actuarial data is common in Denmark, France, Iceland, in certain important schemes in the Netherlands, Sweden and Greece.
- Gender related actuarial factors are used in Belgium, Germany, Italy, Liechtenstein, Malta, Norway, the UK and in some schemes in the Netherlands, in Spain, in Luxemburg and in Ireland. In Italy, such a use is not prohibited by the law, but at the moment there are not occupational schemes that make a distinction between men and women as regards gender related actuarial factors. In Austria, there is no comprehensive information on the use of actuarial data is information available.

In the third pillar, the private insurance schemes, much will depend on how Directive 2004/113 is implemented. From an overview provided by the experts so far (the extended ad hoc request on the state of affairs in the implementation of Directive 2004/113 it transpires that the majority of the Member States and EEA countries will allow for the use of gender related actuarial factors. On the other hand, the Hungarian expert reports that in the newly introduced mandatory private pensions scheme (which can as such not be qualified as occupational) the pension funds and insurance companies are obliged to use unisex life-expectancy tables.

In brief, it would seem that bringing equality in this area of social security – thus both occupational and private schemes – may prove to be the hardest bit.

### **Winding up**

In a number of the national reports valuable suggestions have been made in the sense that the Commission, when considering how to realize gender equality in the social protection schemes, should also take into account the relatively new life-cycle approaches. These approaches weaken, in the first place, the link between employment and social security. Given the fact that for many women it is exactly their employment career that affects their qualification for social security and the benefits they receive, this life-cycle philosophy may work out well. An additional argument may be that the life-cycle approach takes better into account the changing career pattern and may, as such also stimulate to include issues like education leave and active parenthood as insured risks.

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## Reports from the Member States and EEA countries

### AUSTRIA

Anna Sporrer

#### a) General scope of the Directive

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

The most important laws forming part of the first pillar are:

- the General Social Security Act ('Allgemeines Sozialversicherungsgesetz'),
- the Act on Social Security for Persons Engaged in Trade and Commerce ('Gewerbliches Sozialversicherungsgesetz'),
- the Act on Social Security for Farmers ('Bauern-Sozialversicherungsgesetz'), and
- the Act on Social Security for Self-employed Persons ('Sozialversicherungsgesetz der freiberuflich selbständig Erwerbstätigen').

According to these laws general social insurance includes health, accident and pension insurance, provided that full insurance cover is granted. The General Pensions Act ('Allgemeines Pensionsgesetz'), which entered into force on January 1, 2005, is to harmonize the four above-mentioned pension systems by adding up the sum totals of the bases for calculating the insurance contributions acquired under the respective systems.

The Act on Social Security for Notaries Public ('Notariatsversicherungsgesetz') governs the pension insurance scheme for notary publics regarding the insured events of old age, incapacity to work, and death.

The Act on the Social Insurance Fund for Artists ('Künstler-Sozialversicherungsfondsgesetz') governs the payment of benefits by the federal government to the pension insurance contributions of self-employed artists with compulsory insurance in Austria.

The Unemployment Insurance Act ('Arbeitslosenversicherungsgesetz') governs the insured event of unemployment for certain groups of and certain persons in training, except for civil servants in a public-law employment relationship with the federal government or the provincial governments.

The social welfare acts of the provinces ('Sozialhilfegesetze der Länder') can be regarded as 'social assistance according to Article 3 (1) (b) of Directive 79/7/EEC'.

2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?

Total population:

2005:

Employed persons:	3,206,314
Men	1,697,766
Women	1,621,589

Self-employed persons:	385,513
Men	243,120
Women	142,393

3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?

No full insurance cover is granted to persons employed on the basis of quasi-freelance contracts ('freier Dienstvertrag'), home workers, and persons in minor employment.

<u>Quasi-freelance contracts:</u>	<u>2005</u>
Total	27,849
Men	13,781
Women	14,068

In order to narrow the gaps in the insurance cover for quasi-freelance employees, sec. 4 para. 4 of the Austrian General Social Insurance Act provides for an inclusion of that group of employees into the full insurance cover provided that certain requirements are met.

<u>Persons in minor employment:</u>	<u>2005:</u>	<u>Jan 2007</u>
Total	233,072	240,244
Men	69,476	
Women	163,596	

An employment relationship is deemed to be minor if it is agreed upon for less than one calendar month or, if agreed upon for at least one calendar month, if the remuneration paid does not exceed around 300 euro. If this amount is exceeded by the aggregate remuneration received for two or more employments, the person shall be obliged to have full insurance cover. Persons in minor employment, for whom no compulsory insurance is required on the basis of their gainful occupation, have the opportunity to complete their insurance cover by taking out a voluntary insurance policy at their own expense.

*4. In which areas and to what extent are women in particular, excluded from benefits, from access to the schemes or from more generous benefits?*

The main problem regarding social insurance cover for women is that it is tied to a (regular) employment relationship, i.e. without employment under social insurance law, there is no direct entitlement to benefits and where there is an entitlement to benefits, it depends on the amount of the contributions and the time periods during which they were paid (principle of equivalence). This applies to pension payments, sickness benefits, payments received from accident insurance and unemployment benefits.

Half of all women in Austria receive a pension below the equalisation supplement reference rate ('*Ausgleichszulagenrichtsatz*')(approximately 690 euro, 14 times a year). This shows that women are affected by the principle of equivalence more strongly than men.

There are derived rights for spouses, but they usually apply only for the duration of the marriage and only regarding health and accident insurance; personal pension expectancies can only be acquired during child-raising periods. In recent years, the system has been improved considerably for the benefit of women.

No other personal pension entitlements are created during a marriage. In Austria, there is no mandatory 'pension splitting' for wives without gainful employment and/or wives who have neglected their gainful employment in order to bring up their children and keep house.

A person is entitled to a widows' pension (or a widowers' pension) only if he/she was validly married at the time of death of the insured spouse and, in the case of a divorce, only if he/she received maintenance payments from the insured person at the time of his/her death.

Another problem is that pensions are adjusted far below the inflation rate. In the years 2000-2006, the net pensions were adjusted by merely 6.24 % whereas total inflation during the same period was 13.2 %. As the majority of minimum pension recipients are women, they are affected by this *de facto* reduction in pensions to a disproportional extent.

In addition, around 160,000 persons in Austria have no health insurance, this accounts for 2.4 % of all persons over 15 years. 7 % of these persons have no insurance cover following a divorce, 4 % are persons in minor employment who cannot afford voluntary insurance contributions.

*6. How could this situation be amended?*

By supporting the integration of women into the regular labour market:

- Increasing the employment rate of women:
  - supply of adequate childcare facilities have to be insured
  - jobs and working-time models enabling women to reconcile family and working life
- Closing the income gap between women and men:
  - Better education/ further training
  - Reduction of the segregation on the labour market
- Strengthening the autonomy and individuality of old-age pension rights for women:

By introducing a separate pension entitlement for women who, during their marriage, have neglected their gainful employment in order to bring up their children and keep house.

The so-called 'pension splitting', meaning the sharing of the pension with the (ex-)husband, has been possible on a voluntary basis since January 1, 2005: Parents can now agree on a 'voluntary pension splitting' for the years of child-raising starting from 2005.

The parent who is not predominantly engaged in bringing up the children and who is gainfully employed may, for the first four years (in the case of multiple births for the first five years) following the birth of the child, have up to 50 percent of his/her partial pension credit transferred to the pension account of the parent who is bringing up the children. The transfer must be applied for before the child completes his/her 7th year of age. However, this option has not yet been used. It is assumed that the reason for that lies in the risk that both partners might not have sufficient means of subsistence during old-age.

For this reason, the governing parties are discussing this topic at the moment. The Social Democratic party wants to abandon the pension splitting model and intends to contribute to a better integration of the individual employment biographies using different measures, for instance a more flexible child care benefit scheme, the narrowing of the income gap by introducing a minimum wage of 1,000 euro, giving more value to part-time work when it comes to the calculation of pensions, etc.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Yes. This was done basically by granting equality regarding widows' and/or widowers' pensions to men starting from 1980 when the Constitutional Court repealed the provisions that provided for an entitlement to survivors' pensions for women only as being unconstitutional.

Consequently, a step-by-step regulation was introduced and in the meantime men and women are entitled to survivors' pensions in a completely equal manner.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

In Austria the standard retirement age is 65 years for men and 60 years for women. Early retirement age is 61.5 years for men and 56.5 years for women (the early retirement age was increased recently from 60/65 years, despite of the fact that, today only 50 % of all persons retire from regular work, 50 % have been unemployed before regular retirement and have lived on unemployment benefits or special need allowances!).

After the Austrian Constitutional Court in 1990 withdrew the different pension age of women and men as unconstitutional, the legislator governed a step-by-step system, by which the pension age for women shall be increased. A special Constitutional Law gradually raises the statutory retirement age of women to that of men. The transition period for equalising the standard retirement age will be 1 January 2024 to 1 January 2033 (hence, as of this date there will be a uniform retirement age for women and men).

This period of transposition often was criticised as too long. The legislator had the intention to equalize the pension ages of women and men only at that time, when women working in the private sector will *de facto* have the same opportunities with regards to salaries and employment etc. From the perspective of de-facto-equality between women and men and with view to social justice, the equalisation should not be enforced too quickly. As already reported in Austria women only have average pensions of 50 % of the average pensions of men (private sector), the income gap is around 30 % and is increasing (!), the employment rate of women in part time jobs is increasing - without any safeguard provisions which would minimize the negative effects of this kind of employments for the pensions, the unemployment-rates of women are regularly higher than those of men; apart from this, women suffer from several other forms of inequalities at the labour market, they still are the main carers for children and new developments after the introduction of the new system of 'childcare allowances' the employment rate of women returning from parental leave goes down from around 50 % to approximately 30 % whereas the take up rate of parental leave of men still is rather low.

Due to this situation the legislator governed a step-by-step system, by which the pension age for women shall be increased slowly, which can be justified with regard to the existing disadvantages for women at the labour market.

A uniform secondary-law basis would have the advantage that principles that have been established in one field can more easily be introduced into other fields. However, any harmonisation would have to ensure the prevention of 'levelling down' or any deterioration of legal positions already achieved.

Concerning the income of women and men after retirement age it has to be mentioned that – since 2000 – the government adjusted the pensions far below the inflation rate and – in addition to this – shortened the pensions by the same percentage, which was given in the late 90s above the inflation rate.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

Although it is sometimes difficult to distinguish between statutory and occupational social security schemes, it is nevertheless possible using criteria that have been developed to that end. The classification may be difficult in cases where the social system has been laid down by legislation which, in fact, is also based on an agreement between the employer's and the employees' representatives (cf. Article 1 lit. j of EC Directive 1408/71/EEA).

This question was an issue with a view to additional pension insurance with the insurance company for Austrian railroad employees in which connection the Austrian Ministry for Social Affairs came to take the view that the existence of a statutory social security scheme was to be assumed if the following criteria were met:

- essential provisions are based on legislation;
- the contributions are collected by means of administrative measures and not in a private-law manner;
- the system is primarily financed according to the pay-as-you-go principle and not according to the funding principle.

The social security systems for civil servants of the federal government and the provincial governments are allocated to the second pillar and the pension payments to civil servants are considered to be 'pay' within the meaning of the jurisdiction of the European Court of Justice.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

There are no numbers available.

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

In Austria, occupational pension schemes are granted either on the basis of the collective bargaining agreements, shop agreements or individual agreements. All of these agreements provide for direct promises of benefits, which, however, are also dependent on the length of employment.

The Austrian parliament just has passed an act, by which Directive 2004/113/EC shall be implemented into the Austrian legal system by amending the act on insurance contracts ('*Versicherungsvertragsgesetz* 1958') and the insurance monitoring act ('*Versicherungsaufsichtsgesetz*'). The amendments are aimed at implementing the principle of equal treatment of women and men in private insurances. Concerning health insurances the new provisions rule, that costs related to pregnancy and maternity shall not cause higher premiums or less favourable services for women. The prohibition of gender specific treatment shall be indispensable by individual contracts. This principle applies to health insurance only - therefore the amendment seems to not fully comply with the Directive, in particular Article 5 § 3 of the Directive.

Furthermore the legislator made use of the exception in Article 5 § 2 of the Directive, by ruling, that gender related differences may be admissible if and so far the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.

Legal protection is given by the possibility for individuals to claim for compensation before the civil courts, whereas organisations dedicated to consumer protection may claim for omission if those infringements before the civil courts as well.

Due to the new provisions laid down in the insurance monitoring act the insurance companies, which make use of the exception concerning the actuarial factors and statistical data, are obliged to inform the finance market monitoring authority (Finanzmarktaufsicht) and to deliver all relevant documents. Furthermore these companies have to publish widely to the public all statistical data concerning gender based differences related to insurance risks, e.g. mortal tables, gender segregated damage statistics, etc.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

On this question there is no study or examination available, but due to practical experience the defined-benefit-schemes might be the more usual.

*5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of 'old' pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

The Austrian pensions schemes for civil servants are specific. The law on pensions for civil servants is not part of the general social security system. Due to the Austrian Federal Constitution the legislative competences in the field of pensions of civil servants are shared between the federal State and the 'Länder' (Regions). Thus the Federal State as well as the nine Austrian Länder have passed separate acts, each for its own civil servants. Pars pro toto the pension scheme for the civil servants employed by the Federal state shall be described hereunder – the act passed by the Länder differs from it in details.

Due to § 1 of the 'Pensionsgesetz 1965', Official Journal (OJ) 340, as amended by OJ 71/2003, this act rules the entitlement to pensions of the civil servants of the Federal State, their survivors and relatives. 'Civil Servants' in the sense of this act are all employees of the Federal State, whose employments are based on public law.

- At the moment the basic rules for the calculations of the retirement and survivor's benefits are in transition:
  - The regulations on the retirement age always have been formulated gender neutral and therefore the retirement age for female and male civil servants is equal. The retirement age will be raised as well in a step by step system. For persons who are born before 1 October 1940 the regular retirement age is 60 years whereas for persons, who are born after 2 October 1952 the retirement age will be 65 years.
  - Female and male civil servants pay the same contributions, they have the same pensionable age, the same entitlement to old age pension and *early retirement and exchange of survivors benefit for higher old age pension*.

Referring to the 'Beune'-Case: there are no differences in the calculation of pensions neither regarding the sex of the civil servant nor her/his family status.

Referring to the 'Griesmar'-Case: children benefits are granted subject to the condition that the child has been brought up by the civil servant as the main carer for a maximum period of 48 months – equally for female and male civil servants.

Referring to the 'Niemi'-Case: as mentioned above, the regulations on the retirement age are formulated gender neutral and therefore the retirement age for female and male civil servants is equal.

### **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

At the moment, the three-pillar model still matches the actual situation of our society. In Austria, the public pension system is still predominant, but the basis for a general pension system funded by companies has been created by the introduction of new regulations on severance pays due after the termination of an employment relationship ('severance pay new'). The third pillar, private pension schemes, is promoted by means of preferential tax treatment.

With the increasing harmonisation of the pension systems and the change in paradigm in pension policy, according to which ensuring material security during old age is no longer to be regarded as the primary goal of the public pension scheme, but rather additional systems such as occupational pension schemes, private pensions, severance pay, etc. are required in order to guarantee a certain standard of living, the individual systems will increasingly complement each other.

As is shown in particular by the discussions about actuarial factors, more legal regulations and supervisory mechanisms are required, especially in the second and third pillar, in order to remedy or prevent discrimination within the pension system. This might call for further statutory regulations, which will result in a stronger approximation of the framework conditions of these systems. This could also cause the criteria of differentiation factors to become less stringent.

In general, the differentiation between the individual systems into general - public - occupational and private systems should be maintained. This seems to be particularly expedient in order to make the development tendencies in the area of social security transparent. At the moment these tendencies are characterised by reductions within the public system and compensation by occupational and private pension insurance schemes, which may be considered a (partial) privatisation of the social security system.

*2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

The fact that the regulations regarding the three pillars are laid down in different directives has historical reasons and again proves that the more 'distant from the state' an insurance system is, the less accessible it becomes for state-political and legislative-political influence, which is particularly shown by the points in time the Directives came into being.

This fact is also reflected in the issue of gender equality. Here, the growing awareness and the developments in legal policy are responsible for the penetration of this principle into primarily private-law areas. The obstacles that have to be brought to mind whenever the principle of gender equality is to be introduced or strengthened in a certain field are mostly to be found with the respective political opponent. In my view, the split legal structures as such cannot be seen as the actual obstacle.

The fact that some directives are more than 20 years old must not be only a disadvantage. One has to admit, however, that the variety of legal sources (directives, jurisprudence, soft law) in the field of equality law might lead to legal uncertainty as well. Nevertheless any changes in this field could be regarded as improvement only in the case that it can be guaranteed, that there will be no 'watering down' in substance. If all provisions of the directives mentioned will be opened for negotiations by the Member States, there is a real danger that under the title of 'modernisation' or 'reform' the *aquis* will lose in substance (we learned this through the negotiations of the Charter and in the actual debates in the Convent, even the amending directive 2002/73 made the admissibility of derogations more open). Therefore it should be made clear in the very beginning, that this exercise only can be regarded as improvement of equality law if there will be no losing of substance.

## **BELGIUM**

*Jean Jacqmain*

### **Preliminary note**

It is impossible to answer the questionnaire without relying on a '*résumé*' of the legal situation, which is very complex (although it falls entirely within the federal jurisdiction).

A. Paid workers: as organised by the Act of 30 June 1981, the statutory scheme subdivides into five branches: sickness insurance, including healthcare, benefits and protection of maternity (Consolidated Act of 14 July 1994); unemployment insurance (Royal Decree of 25 November 1991); family benefits (Consolidated Act of 19 December 1939); retirement and survivors' pensions (Royal Decree no. 50 of 24 October 1967); and annual holiday (Consolidated Act of 28 June 1971). The accidents at work (Act of 10 April 1971) and occupational diseases (Consolidated Act of 3 June 1970) schemes are attached elements.

Statutory benefits may not be replaced, but only supplemented by occupational benefits; the latter are not regulated by way of statutes, with the exception of supplementary retirement and survivors' pensions (Act of 28 April 2003).

- B. Self-employed persons and their helpers (including assisting spouses): as organised by the Royal Decree no. 38 of 27 July 1967, the statutory scheme subdivides into three branches: sickness insurance, including healthcare, benefits and protection of maternity (R.D. of 20 July 1971); family benefits (R.D. of 8 April 1976); retirement and survivors' pensions (R.D. no. 72 of 10 November 1967). A 'social insurance against bankruptcy' was added by a R.D. of 18 November 1996.
- C. Tenured staff members of the public services: the paid workers' schemes concerning healthcare and family benefits are applicable. Instead of sickness benefits, a staff member remains entitled to his/her remuneration (or part of it); if the public employer terminates the appointment prematurely, a "safety net" scheme (Act of 20 July 1991) gives access to unemployment and sickness benefits; accident at work and occupational diseases are covered by a single statute (Act of 3 July 1967). Finally, the retirement pensions scheme (Act of 21 July 1844) completed by a survivors' benefit scheme (Act of 15 May 1984), is regarded unanimously as a statutory scheme; however, under ECJ's *Beune*, *Evrenopoulos* and *Niemi* jurisprudence it is occupational.
- D. There is also a statutory old-age pension scheme (Act of 1 April 1969) which is assistential in nature as it does not require any contributions but is conditional on a means test; an auxiliary family benefits scheme (Act of 20 July 1971) for persons who are not entitled otherwise, also conditional on a means test; and the statutory healthcare scheme for paid workers is accessible to persons not protected otherwise, conditional on contributions. The general assistance scheme (Integration Income Act of 26 May 2002), which entails a means test, frequently serves as a de facto substitute to the unemployment insurance scheme.

## I. Directive 79/7/EEC

### a) General scope of the Directive

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

All the schemes listed in the preliminary note under A, B and C are first-pillar systems, including those (family benefits, survivors' pensions and annual vacations for paid workers) which fall without the scope of Directive 79/7. Notwithstanding the ECJ's jurisprudence, there is unanimity to regard the pensions scheme for tenured staff members of the public services as part of the first pillar as well (see above).

The status of the assistance schemes listed under D) is more difficult to define, as there is no connection, unless a negative one, with the statutory social security schemes, and assistance benefits may be granted to persons who have ceased to be entitled to statutory ones as well as to persons who never were entitled. However, there is no hesitation at challenging gender discrimination in assistance schemes as well.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

Given the purpose of such a comprehensive system, one would expect every member of the population to be covered in one way or another. However, due to the dynamics of deprivation and exclusion, an ill-defined proportion of persons (mainly homeless) even fall out of the assistance schemes; there is also a smaller category of persons (aliens in various 'irregular' situations) who are not entitled to any benefits.

Given the complexity of the schemes (see Preliminary note), according to the expert it is not very well feasible to undertake the necessary - extremely time consuming - statistical investigation.

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case *Nolte*, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

No occurrence similar to the *Nolte* case can be observed in the Belgian legislation, although very short periods of occupation might entail insufficient contributions to be paid to the social security scheme, resulting in exclusion from the healthcare insurance. Under the new Act of 3 July 2005, voluntary work does not give access to entitlement, as it is supposed to be performed by persons who are entitled in another capacity.

4. *In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

Two situations deserve attention.

Firstly, domestic servants who are employed for less than a total of 24 hours per week and less than 4 hours per week by the same employer are excluded from the social security scheme for paid workers.

Second, employer's and employee's contributions must have been paid for a minimum of 6 months before the employee is entitled not only to sickness benefits, but also to maternity benefits, resulting in a breach both of Directive 92/85/EEC and of Directive 79/EEC as the maternity insurance is attached to the sickness scheme. Worse: apprentices in small concerns are regarded as dependent on their parents, and thus excluded from social security scheme for paid workers; consequently, during the maternity leave a female apprentice is not entitled to any benefit; but as the working conditions legislation is applicable to apprenticeship, an apprentice must be regarded as a worker under Directives 92/85/EEC and 79/7/EEC; thus the double breach is obvious.

5. *How could this situation be amended?*

In the case of domestic servants (or, to call a spade a spade, charwomen), there is a cynical consensus to consider that those persons are covered as dependents on their husbands/partners and thus are not interested in paying contributions (neither are their employers). Indeed, when in the 1980s the government offered them access to the unemployment scheme provided they paid reduced contributions, the plan failed dismally.

Concerning the maternity insurance, the minimum condition of affiliation should be repealed, although the Office of Healthcare and Sickness Insurance claims that no woman was ever denied maternity benefits for that reason. As to apprentices in small concerns, obviously they must be granted maternity benefits, even though no contributions have been paid, as statistically the resulting costs would be negligible.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. *Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

So far, Belgian statute law does not include any proper provision aimed at prohibiting gender discriminations within the scope of Directive 79/7/EEC; that gap will not be filled up until the present Gender Equality bill is adopted by parliament. However, in compliance with the Directive, the various social security statutes have been amended repeatedly; a number of gender discriminations in family benefits and survivors' benefits have been eliminated.

2. *Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

After Directive 79/7 came into force, Belgium maintained a difference in the ages of retirement (60 for women and 65 for men), entailing a difference in the length of the career giving access to a full benefit (40 years for women, 45 for men). After a number of tribulations (see ECJ's cases C-154/92 Van Cant and C-377/96 through 384/96 *De Vriendt*), the remaining differences will disappear by 1 January 2009 (presently, women are entitled to a full benefit at 64 after a 44 year career). That evolution does not concern the "civil servants" scheme, under which the age of 65 and a career of 45 years were always applicable to men and women alike.

3. *What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

4. *Should these exclusions in your opinion be repealed? Please specify, which and why.*

The expert did not feel at ease in responding to these questions.

#### **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. *Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

Yes, given that for paid workers and self-employed persons, affiliation to the statutory schemes is compulsory, and that occupational schemes only may supplement the statutory ones. For 'civil servants', see at 5 below.



2. *What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

First, to give a general idea, in 2003 the benefits granted under the three statutory schemes (including 'civil servants') added up to 22.7 billion euro; and under the occupational schemes, to 3.7 billion euro.

There does not seem to be any gender-segregated breakdown of the latter figure available. However, in the Equal Opportunities Council's Opinion n°77 of 17 October 2003, concerning occupational pensions, the following indications are to be found: in 2003, among the retired paid workers, 12.8 % were entitled to a supplementary occupational pension and among the active paid workers, 35 % were affiliated to an occupational pension scheme. In both cases, women only represented a minor part of the percentages, due mainly to the vertical and horizontal segregation of the labour market.

3. *To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

Article 14 of the Occupational Pensions Act of 28 April 2003 took careful notice of Article 6 of the revised Directive 86/378, and allows gender-related actuarial factors to be used in defined-benefit schemes. Most probably, that faculty is put to use in all the concerned schemes.

4. *Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

Not available. According to a member of the Advisory Council of Occupational Pension Schemes, the insurance companies (which manage most of those schemes) decline to release any information on that topic.

5. *Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

As mentioned in the preliminary note above, the Belgian pension for tenured staff members of the public services is still commonly regarded as belonging to the first pillar. Given that survivors' benefits, which so far had been reserved for widows, were made available to men as well by the Act of 15 May 1984, and that the scheme included no peculiarities similar to the French ones as discussed in cases Griesmar, C-366/99 and Mouflin, C-206/00, nobody in Belgium can see how regarding 'civil servants' pensions as part of the second pillar would strengthen the implementation of the non-discrimination principle. For instance, in 1990, it was discovered that the 'holiday bonus for pensioners' (in fact a supplement to the lower benefits) was available to women as from the age of 60, and to men from 65, while persons of both sexes may anticipate the uniform retirement age of 65 by a maximum of 5 years; when one public services union (C.G.S.P.) pointed at the discrimination, quoting Directive 79/7/EEC, the faulty regulation was quietly amended in favour of men.

### **III. The three pillar system as a whole**

1. *Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

Yes, certainly. However, maintaining the primacy of first pillar pension schemes and making their financing secure has become a vital element in the ideological and political debate; in that context, transferring the 'civil servants' scheme to the second pillar for the purpose of Community gender equality law seems to be a meaningless complication.

2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?

As to Directive 79/7/EEC, when the Network's suggestions were required concerning the Commission's intention to propose a recast of existing Directives, this expert opined that it was more urgent to fill the gaps in the scope of Directive 79/7/EEC, by extending it mainly to family benefits and survivors' benefits. As to Directives 86/378/EEC (as amended) and 2004/113/EC, this expert can only refer to Opinion n° 83 of the Equal Opportunities Council (to which he contributed): the E.O.C. pointed at the incoherence between those two instruments concerning the use of gender-related actuarial factors, which are accepted (with qualifications) by the former and ruled out in principle (with qualifications) by the latter, while in Belgium the same insurance companies may be active both in second and third-pillar schemes.

Finally, this expert wishes to underline the potential importance of the decision which the ECJ will produce in the Lindorfer case, C-227/04 P.

## **BULGARIA**

*Genoveva Tisheva*

### **I. Directive 79/7/EEC**

#### **a) General scope of the Directive**

1. *Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

According to the Bulgarian Social Insurance Code/ or Social Security Code/, article 2, the public social insurance provides benefits, allowances and pensions for: 1. temporary disability; 2. temporarily reduced working capacity; 3. disablement; 4. maternity; 5. unemployment; 6. old age and 7. death.

According to Article 11 persons insured against all social insurance risks shall be entitled to:

1. cash benefits for:
    - (a) temporary disability through general sickness, employment injury and occupational disease, for sanatorium and resort treatment and urgent medical examination or test, quarantine, suspension from work prescribed by the health authorities, attendance of a sick person or a quarantined family member, urgent accompanying of a sick family member for medical examination, tests or treatment, as well as for care of a healthy child suspended from a children's establishment due to a quarantine at the establishment or of the child;
    - (b) occupational rehabilitation upon working capacity temporarily reduced by general sickness, employment injury or occupational disease;
    - (c) occupational rehabilitation by reason of pregnancy and nursing;
    - (d) pregnancy and child-birth;
    - (e) child-care;
  2. cash allowances for:
    - (a) disablement by general sickness, where there are no grounds for granting a pension;
    - (b) preventive care and rehabilitation;
    - (c) technical aids related to the impairment;
  3. (new, SG no. 1/2002) unemployment benefits;
  4. (renumbered from Item 3, SG no. 1/2002) pensions for:
    - (a) contributory service and retirement age;
    - (b) disablement by employment injury or occupational disease;
    - (c) disablement by general sickness.
- (2) (Amended, SG no. 1/2002) Upon the death of the insured person, his or her spouse, children and parents shall be entitled to a lump-sum allowance to an aggregate amount equal to two minimum wages and to a survivor pension.
- (3) (New, SG no. 1/2002, amended, SG no. 67/2003) The cash allowance for disablement by general sickness, where the insured person does not have the required contributory service for granting of a general-sickness invalidity pension, shall amount to a 60-day benefit for temporary disability determined according to Article 41 herein.

Article 12 (1) (Amended, SG no. 1/2002) Persons insured against employment injury and occupational disease shall be entitled to:

1. cash benefits for temporary disability through employment injury or occupational disease, sanatorium treatment, urgent medical examination, medical tests and/or treatment;
2. cash benefits for preventive care and rehabilitation;
3. employment-injury or occupational-disease invalidity pension;
4. amounts for technical aids related to the impairment.

(2) (Amended, SG no. 1/2002) In case of death of the insured person, caused by the employment injury or the occupational disease, his or her spouse, children and parents shall be entitled to a lump-sum benefit amounting to two minimum wages and to a survivor pension.

Article 13 (1) (Amended, SG no. 1/2002) Persons insured against disablement by general sickness, old age and death, shall be entitled to:

1. general-sickness invalidity pension;
2. contributory-service and retirement-age pension;
3. cash allowances for technical aids related to the impairment.

(2) (Amended, SG No. 1/2002) Upon the death of the insured person, his or her spouse, children and parents shall be entitled to a lump-sum allowances to an aggregate amount equal to two minimum wages and to a survivor pension.

2. *As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

The total population of Bulgaria in 2006 was 7,661,328. The insured persons were 2,665,598, the number of pensioners – 2,285,144, so the dependency ratio was 85.7 % and the replacement rate 43.8 %.

There is no publicly available data about the persons covered by the different sectors of benefits. The data would rather be related to the amounts of benefits allocated by insured risks.

3. *What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

The main reasons to exclude people from receiving benefits are: unpaid social security contributions, participation in non remunerated jobs. According to the Bulgarian Social Insurance Code/ BSIC/- Social Insurance Entitlement of Persons Insured against Disablement by General Sickness, Old Age and Death (Heading amended, SG no. 1/2002).

4. *In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

Women prevail in the spheres where social security contributions are not paid or not paid in full amount, as in the informal sector or in female-dominated industries, like the garment industry, etc. Women also prevail in participation in non remunerated jobs and therefore are more affected by exclusion from benefits. The exclusion is not related to the legislation or its implementation but it results from the specificity of economic development during the transition period.

6. *How could this situation be amended?*

The exclusion of some groups of workers from the social security benefits cannot be overcome easily as it is due to macro-economic factors. More specifically, the exclusion of more women from the system does not derive from the legislation, which is gender neutral as a whole but it is the result of the factual situation of women on the labour market.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. *Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

In Bulgaria at the moment universal family benefits do not exist, only targeted family assistance was introduced by the Law on Family Assistance for Children from 2002. Therefore it cannot be considered as a part of the social security benefits. The targeted assistance cannot contain the principle of gender equality. Survivor's benefits make formal part of the social security under the BSIC which contains also the principle of equality based on gender.

2. *Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

No exclusion is provided for the application of the gender equality principle. According to Article 3 of the Bulgarian Social Insurance Code / BSIC/ , public insurance shall be implemented on the basis of several principles, the principle of non discrimination of the insured persons included.

The pensionable age of men and women has not been harmonised by the Social Insurance Code. According to Article 68 of the Code, at the moment of the adoption of the code, this code was fixed at 60 years and 6 months for men and 55 years and 6 months for women. Since December 2000 this age is being increasing with 6 months for both men and women from the beginning of each year until reaching 63 years for men and 60 years for women.

3. *What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

This difference in the pensionable age cannot be overcome also because of the whole philosophy of the incentive measures at the labour market adopted by the government. The approach is the one aimed at the so called 'measures for active employment'. It does not include the women at pensionable and before pensionable age who cannot benefit of the incentives created for the employers who employ representatives of the groups at risk in the labour market. They cannot get advantage of the employment subsidized by the government.

On the other hand, the difference in the pensionable age can be justified by the unequal working cycle of men and women, by the non counting as insured of some reproductive activity of women as well as by the still unequal position of women in the labour market.

4.. *Should these exclusions in your opinion be repealed? Please specify, which and why.*

As mentioned above, there are no statutory exclusions.

The difference in the pensionable age cannot be overcome soon for different economic reasons. The considerations were expressed above.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. *Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

The pension system in Bulgaria consists of three pillars from the beginning of the year 2000. The model was based on World Bank advice and is different from the pillars in the EU countries. The first pillar is universal social security fund, pay as you go type, obligatory for persons under employment relationship or self employed (details in Article 4 SIC). The 'points' system was introduced defining the entitlement to pension for insurance and old age-the main pension paid in Bulgaria. Points are calculated as the sum of contributory years and age at the time of retirement (the Social Insurance Code envisages gradual increase of the retirement age and the respective points until the age of 60 and 94 points for women and for men - at the age of 63 and the acquisition of 100 points). The sum of points and legal retirement age is different for men and women. Whenever the sum of duration of contributory years and age is smaller than the legally defined one, the entitlement to pension shall be acquired upon turning the age of 65 for both men and women and with at least 15 years of contributions, including 12 real years of effective work. The levels of replacement are relatively low. The average gross replacement rate, as of 31 December 2005, is 40.6 %. There are considerable differences as per gender, age and category of labour. Thus the personal pensions for insurance and age for women in 2005 provided for just 33.9 % replacement of the gross income while the percentage for men is 56.6 %. to the end of guaranteeing protection for the most vulnerable among elderly people, the pension system has introduced an interrelated system of minimum benefits covering a large scope of risks. The minimum benefits play an important role in the Bulgarian pension system. They are granted to 22.3 % of all pensioners on state social insurance. The national budget allots funds for assistance to more elderly people and poor people to pay their heating bills.

The second pillar is mandatory and fully funded pension fund with defined contributions which are allotted to individual accounts run by licensed pension insurance companies. It has two components - compulsory universal and compulsory professional funds. The coverage of the universal fund is general for all insured persons born after 1959. Benefits payable from the universal funds are received from the date of entitlement to a pension for insurance and age or 5 years earlier under specific terms and conditions.

Benefits are taken as a supplementary life long pension calculated at the time of retirement, or as a lump sum (phased withdrawal when the amount is relatively small - less than 20 % of the social old age pension). Accrued funds are fully inheritable at any point, by spouses, parents and children. The professional funds cover workers in first and second category of labour (miners, workers in metallurgy, etc.) - some 191,000 insured persons. These funds allow for receipt of pension eight years earlier than the standard retirement age for workers under terms and conditions specific for second category.

The supplementary voluntary pension insurance provides for the opportunity that persons save on the basis of individually set contributions, deposited in private pension funds run by licensed pension insurance companies. The contributions are made by the person, by the employer or other natural persons or legal entities. Contributions (within limits) to the funds are tax advantaged. Payments can be done in the form of pensions for old age and disability-life long or term defined, as well as survivors' pensions and in the form of lump sums or phased withdrawal. The third pillar contains schemes on the basis of collective agreements and schemes on the basis of each individual's will. Therefore, in Bulgaria there is no second pillar system comparable to the EU standards.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

It is not applicable because there is no compatibility of the systems.

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Article 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

Non applicable for Bulgaria at the moment.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

Defined contribution schemes are prevailing.

*5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

Non applicable for Bulgaria.

### **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

As mentioned before, the three-pillar system in Bulgaria is different from this system in the majority of the EU countries and cannot correspond to the EU standards. This is due to the fact that several of the new member states (Bulgaria, Slovakia and Poland included) have opted for the World Bank model.

*2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

From a Bulgarian point of view, it is difficult to assess the system in terms of gender equality given the considerable difference in principles.

Speaking more generally and in terms of legislation, the social security standards of the EU seem conducive to gender equality. The main inequalities derive not from legislation but from realities and unequal position of women in the labour market.

For this reason, according to us and given the differences between the systems in the member states, it is maybe better to compile a new set of gender equality standards valid for all pillars and encompassing the differences in the systems. These standards should take in consideration and address not only formal indicators of equality/inequalities but also the root factors of inequality of women and men in the labour market and in society as a whole. These factors impact on equality/inequalities in the social security system.

## **CYPRUS**

*Lia Georgiades*

### **1. Directive 79/7/EEC**

#### **a) General scope of the Directive**

1. The current pensions system in Cyprus comprises the General Social Insurance Scheme (G.S.I.S.), the Social Pension Scheme, the Special Allowance for pensioners, (first pillar systems) the Occupational Pension Schemes for employees in the broader public sector and Voluntary Provident Funds and other similar collective agreements (Second Pillar Schemes). Moreover Public Assistance Scheme exists which provides financial assistance for social services to persons whose means are not insufficient to meet their basic and special needs.

The General Social Insurance Scheme falls under Directive 79/7/EEC and is required to cover all persons gainfully occupied in Cyprus, either as employed or self employed persons.

There are no differences concerning gender in pension legislation on pensionable age. The pensionable age according to the Social Insurance legislation is the age of 65 for both men and women. However, old age pensions can be paid at the age of 63, under specific contribution conditions.

The G.S.I.S. provides for the following benefits:

- (a) Invalidity pension
- (b) Old age pension
- (c) Widow's pension
- (d) Sickness benefit
- (e) Unemployment benefit
- (f) Employment injury benefit, which includes –
  - (i) Temporary incapacity (injury benefit);
  - (ii) Disablement benefit; and
  - (iii) Death Benefit.
- (g) Orphan's benefit
- (h) Maternity grant
- (i) Marriage grant
- (j) Funeral grant
- (k) Maternity allowance
- (l) Missing person's allowance

**Benefits provided** under the Social Insurance Scheme comprise (a) a basic benefit (b) a supplementary benefit. The basic benefit which includes increases for **dependants**, is related to the insurable earnings of the insured person concerned in the lower band. The supplementary benefit is related to the insurable earnings of the person concerned in the upper band. No increases for dependants are payable on the supplementary benefit. A minimum pension is payable to both men and women with a sufficient insurance contribution record. The rate of contribution to the G.S.I.S. and the method of calculation of pensions and benefits provided are the same for both men and women.

Positive discrimination in favour of women constitutes the assimilation, under the General Social Insurance Scheme (GSIS), of periods of child care of up to three years for each child, as well as the Social Pension, which benefits almost entirely non-insured women, and the mother's allowance, which is paid to every woman who has raised four or more children. Credits equal to the amount of insurable earnings are provided for persons who interrupt their employment for parental leave. No credits are provided under Social Insurance legislation for unpaid work.

In Cyprus there are, Social Assistance Schemes which aim to supplement or replace the G.S.I.S. and increase pension income such as the Public Assistance Scheme and the Special Allowance.

### Special Allowance to pensioners

The Special Allowance is payable to pensioners whose pension income does not exceed CY£6500 (approximately 10,920 euro per year at the current rate of exchange). It is paid without any assessment of income from work or other sources and without taking into account the households total pension income, since each pensioner is treated as a member of a single person household.

### Public Assistance Scheme coverage

Every person legally residing in Cyprus has the right to a decent standard of living. This right is ensured through the provision of financial assistance and/or social services to persons whose means are insufficient to meet their basic and special needs. These basic needs include food, clothing and footwear, electricity, water supply and healthy living conditions. Special needs include rent, a special diet allowance, a disability allowance, pocket money and allowances for home care, day care and institutional care. It is also possible to provide assistance for house repairs, for payment of interest on mortgage loans, heating etc. The rates of public assistance are indexed annually to a special consumer price index.

Care services to the aged are provided in institutions and at home. In 2003 the number of persons in care comprised approximately 9 % of the population aged 65 and over.

Furthermore, the provision of **Social Pension Scheme (S.P.S.)** closes the gap in accessibility to pensions by providing non-means tested pensions to those residents, who, for any reason have not participated in the labour market and as a consequence have no pension income either from the General Social Insurance Scheme or from any other source. In other words, the Social Pension Scheme ensures universality in pension provision. The Social pension is equivalent to the basic social insurance pension.

The S.P.S. is of importance for women, especially of the older generation in receipt of low labour force participation rates, and non-remunerated family work in agriculture as well as for housewives.

2. Currently the Cyprus Social Insurance Schemes covers 375,848 persons.

Coverage: Employed, self-employed persons and voluntarily insured persons; in terms of gender distributes: men: 54 % women: 46 %. December 2006.

### Pensioners on the Social Insurance Scheme

Type of Pension	Number of persons		
	Men	Women	Total
Old age pension	47,988	24,383	72,371
Widow's pension	-----	26,770	26,770
Sickness invalidity pension	47,988	24,383	72,371
Invalidity pension	952	146	1098
Orphan's pension	659	813	1472
Missing person's allowance	-----	280	280
Social pension	365	69,272	14,886
<b>TOTAL</b>	<b>54,541</b>	<b>69,272</b>	<b>123,816</b>

As regards survivors' benefits, a widow's pension is payable only to a widow. A widower's pension is payable only in cases in which a widower is permanently incapable of self support.

3. The Social Insurance Scheme legally is required to cover all persons gainfully occupied in Cyprus, either as employed or self-employed persons. The G.S.I.S. is financed by contributions paid by the employers, the insured persons and the State.

In the case of **employed persons**, the contribution is 16.6 % of their 'insurable earnings' and is shared among the employer, the employee and the state in the following proportion: 6.3 %, 6.3 % and 4 % respectively. These contributions finance all benefits of the General Social Insurance Scheme. The amount of pension depends on the duration of insurance, the insured earnings and the number of dependants of the person concerned.

At the time of the award of a pension, the above figures (points) are revalued according to the current value of the 'basic earnings which are indexed to the fluctuation in average insured earnings.'

'Insurable earnings' are earnings on the basis of which contributions and benefits are calculated and include any remuneration derived from employment, excluding ex-gratia payment and occasional bonuses. The legislation defines a maximum amount of insurable earnings for the purpose of contributions, which is revised every year. In the case where earnings are higher than the maximum amount of insurable earnings, no contribution is paid on that higher amount.

In the case of **self-employed persons**, the contribution is 15,6 % of the insurable income of the person concerned. Of this 15.6 %, 11.6 % is paid by the self-employed herself/himself and 4% by the State.

The insurable earnings of the self-employed are fixed by regulations according to occupational category. In the case of **voluntary contributors**, the contribution is 13.5 % on the amount of earnings which they fix (10 % is paid by the voluntary contributor herself/himself and 3.5 % by the State).

Insurable earnings include a lower limit known as 'basic earnings'. These basic earnings constitute a demarcation line between the two components of the S.I.S., that is, between the basic component and the earnings-related component. The total annual insurable earnings of every insured person are divided into two 'bands', the lower 'band' which includes insurable earnings up to the 'basic' level of earnings and the 'upper band' which includes insurable earnings above those of the 'basic earnings'.

The amount of basic insurable earnings as well as the ceiling on such earnings are adjusted to the fluctuation in the general level of insurable earnings every year.

**The Benefit Structure**, as well as all periodic benefits, that is, benefits excluding grants, comprise of: (a) the basic benefit; (b) the supplementary benefit.

**The basic benefit**, which includes increases for dependants, is related to the insurable earnings of the insured person concerned in the 'lower band'.

**The supplementary benefit** is related to the insurable earnings of the person concerned in the 'upper band'. No increases for dependants are payable on the supplementary benefit.

In cases where insured persons do not fulfill the necessary contribution conditions (which are related to short periods of employment) they are not entitled to benefits out of the Social Insurance Scheme.

4. The benefits provided under the G.S.IS apply both to men and women and within this context there is no discrimination between the two sexes.

There is discrimination between unmarried and married women in cases in which both are not insured and give birth to a child/children. An unmarried woman does not receive a maternity grant whereas a married woman is entitled to receive this due to her husband's participation on the G.I.S.S.

6. Reform of G.S.I.S. legislation is required and as far as I am concerned there is an on going dialogue with the social partners to reform legislation and make the pension system sustainable.

**(b) Exclusions mentioned in Article 3(2) and Article 8(I) of the Directive 79/7/EEC:**

1. There are no differences concerning gender in pension legislation. As I have mentioned above in § 1.4 the same benefits from S.I.S., excepting the widower's benefit, accrues to both men and women without discrimination.

2. In Cyprus the pensionable age according to G.S.I.S. legislation is 65 for both men and women. The assimilation, under the General Social Insurance Scheme, of periods of child earnings of up to three years for each child, as well the Social Pension, which benefits almost entirely non-insured women, and the mother's allowance, which is paid to every woman who has reared four or more children, is in favour of women.

Female government employees who have given birth are entitled to an additional three months maternity leave, additional to the 16 weeks granted by law to all female employees. This time is counted as pensionable service under the government employees pension scheme.

Cyprus has excluded gender equality in cases involving granting of increases for a dependent wife to the following benefits:

- long-term invalidity
- old age
- work-related accident



- occupational illness/sickness

Benefits provided under G.S.I.S. apply both to men and women and within this context there is no discrimination between the two sexes except for a survivor's benefits.

3. As regards survivors benefits, a widows pension is payable only to the widow. A widower's pension is payable in cases in which a widower is permanently incapable of self support.

4. In my opinion the above provision should be extended to men as well.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. In Cyprus there is a clear distinction between statutory pension schemes and occupational schemes. More precisely, the General Social Insurance Scheme and the Social Pension are considered to be statutory pensions whereas the Occupational Pension Schemes for Employees in broader public sector and the Voluntary Provident Funds and other Pension Schemes related to pay and work relationship fall under the category of occupational pension schemes.

2. According to available data based on the 2003 survey the following table reflect the situation. This situation has not substantially changed. Recently the directive 2003/41/EC been passed as national law 146(I)/2006 which provide for the Establishment, Registration Functioning and Supervision of the Occupational Pension Provisions.

<b>Coverage of Supplementary Occupational Schemes - 2003</b>		
Total number of contributors to the social insurance scheme (000s)	334.0	100%
Occupational Pension schemes:		
Government employees	30.0	9.0 %
Semi-Government employees	7.5	2.2 %
Bank employees	7.5	2.2 %
Other employees	95.0	28.4 %
Self-employed (Doctors & Lawyers)	2.5	0.8 %
Employees without any supplementary coverage	159.7	47.8 %
Self-employed without any supplementary coverage	31.8	9.6 %

3. As far as we are in a position to know, the rate of the contributions paid by men and women is the same.

4. The trend prevailing in Cyprus is that of defined-contribution-schemes.

The Occupational Pension Scheme for Government and Semi-Government Employees cost, is fully covered by the employer and the employee pay 0.75 % of his/her remuneration only for the transfer of his/her pension to the widow's/widowers and orphans.

Total cost of the scheme is 28 % per employee.

5. In Cyprus there is no discrimination between men and women in terms of calculating pension rights or retirement age.

## **III. The three-pillar system as a whole**

We believe that the three-pillar system as a whole is still a meaningful instrument in describing the different schemes operating in the Member States. However in Cyprus the third pillar does not exist.

## CZECH REPUBLIC

Kristina Koldinská

### I. Directive 79/7/EEC

#### a) General scope of the Directive

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

In the Czech Republic there are the following schemes and benefits which may be considered as being part of the first pillar:

The sickness insurance scheme – Act No. 54/1956 Coll. (in force until 31 December 2007) and Act no. 187/2006 Coll., on sickness insurance (in force from 1 January 2008).

Within the sickness insurance scheme a care benefit, sickness benefit, maternity benefit and compensation benefit for pregnant women and mothers are provided.

Disability and old age are covered by the pension scheme – Act no. 155/1995 Coll., on pension insurance – through an invalidity pension and old age pension, and in certain circumstances old age is covered also through a widow or widower's pension.

Accidents at work and occupational diseases are covered by labour legislation and obligatory accident insurance until December 2007. As from 1 January 2008 a new Act no. 266/2006 Coll., on Accident Insurance of Employees will enter into force. Within this act the following benefits are envisaged: an accident supplement, accident compensation, accident rent, smart money, a lump sum to survivor, and survivor subsidy.

There are no social assistance schemes which aim to supplement or replace the first pillar schemes.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

The sickness insurance scheme and pension insurance scheme cover almost all economically active people. As employees, some 60 % of the population are covered by sickness insurance and pension insurance. As self-employed persons, some 8 % of the population are covered by the pension scheme. Sickness insurance covers less self-employed persons – some 2.5 % of the population, because participation in the sickness insurance scheme is voluntary for self-employed persons.

There is a further 25 % of the population which is covered by the pension scheme who are pensioners with the right to draw their pension.

As regards accident insurance, it is not possible to provide information about the level of coverage, as the system has not yet been implemented. In principle, it will cover 100 % of employees, so the coverage will be more or less the same as that in the case of pension insurance for employees.

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

There are no specific reasons to exclude people from receiving benefits. The criterion of receiving benefits is in general participation in the scheme, which is for employees obligatory. The legal condition of obligatory participation in the scheme is in general the existence of an employment relationship or registration as a self-employed person (for the latter category, participation in the sickness insurance scheme is voluntary). In the new sickness insurance Act (no. 187/2006 Coll.), there is the condition of participation in the scheme, of the duration of the employment relation at least for 15 days, and the remuneration must be agreed at least to the amount of 1,500 CZK (ca. 50 euro) per month. I do not think these conditions would affect more either women or men: they are neutral from the point of view of gender equality.

*4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

The conditions of the Czech social security systems are normally not tied to gender. There are however two problems in the pension system, which allow access to more generous benefits for women. The first is connected with the pensionable age.

Whereas there is one pensionable age for men, which is being gradually increased, there are differences in the pensionable age for women, according to the number of children they have raised. This does not automatically apply to men, even if a man has brought up his children alone. In such a case, he may only apply to have the period of his care for the children counted as an insured period. On the contrary, for a woman who has cared for children, the period of her care is counted automatically, without any necessity to apply for it.

*6. How could this situation be amended?*

There is already a governmental proposal in order to change this situation. Within the proposal of parametrical pension reform, it is envisaged to gradually remove differences in the pensionable age which are connected with child care. There is also a proposal to equal the procedural conditions for counting a care period as an insured period for men and women.<sup>2</sup>

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Yes, regarding family benefits, there is no difference based on sex. Since 1995 there is parent benefit, which can be claimed by one of parents. In reality however, the benefit is in 98 % of cases claimed by women.

As regards survivors' benefits, there are also equal conditions for claiming a widow's and a widower's pension. The only difference is in the age which must be reached in order to be able to claim a survivors' pension for an unlimited period. In the case of widows this age is defined by Article 50 of the Act no. 155/195 Coll., on pensions as being 55 years, but in the case of widowers this is defined as being 58 years. Such a difference is however allowed by the Directive even for old age pensions.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

The Czech Republic has excluded gender equality in relation to the determination of pensionable age, as already described in the answer to the question I.a)4.

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

See the answer to the question I.a)4.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

Yes, there are already some proposals in this regard. See the answer to the question I.a)6.

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

Unfortunately, this whole part of the questionnaire is not relevant for the Czech Republic, as there is no II. pillar scheme yet. The Czech Republic has been many times challenged by the Commission because of this problem, but still there is no real scheme yet. Therefore, the Commission started the infringement procedure against the Czech Republic because of its not implementing relevant directives, especially Directive 86/378/EEC.

In the Czech Republic, there are some aspects of the occupational schemes, for example there is a possibility for the employer to contribute to the individual pension scheme of his employees, according to Act no. 42/1994 Coll., on supplementary pension insurance with the State contribution, Article 27. This act also prohibits discrimination within supplementary pension insurance in its Article 2a.

Moreover, some employers provide their employees with some benefits which can probably be seen as an occupational scheme. There is however no legislation on such benefits, nor any representative information on them.

To sum up, it is not possible to answer properly questions 1-5 in this part.

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<sup>2</sup> Especially because of the fact, that on 1 July 2007 shall enter into force the decision of the Czech Constitutional Court no. Pl ÚS 42/04 (available in Czech language on internet address [http://www.judikatura.cz/cgi-bin/jus/aspi\\_lit\\_4?WVCNC+2640+jus-1](http://www.judikatura.cz/cgi-bin/jus/aspi_lit_4?WVCNC+2640+jus-1)), which abolished the relevant articles (§ 5 par. 3 of the Act no. 155/1995 Sb., on pension insurance and § 6 par. 4 a) 11 of the Act no. 582/1991 Sb., on organisation of social security).

### III. The three pillar system as a whole

1. *Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

With regard to the remark made on part II. of the questionnaire, in the Czech Republic the three pillar system is probably not a very meaningful instrument to describe the different schemes in the country.

2. *Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC: the second pillar and occupational security schemes; the new 2004/113/EC: the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

From the Czech point of view, it could be also a hindrance to a certain extent. The situation in the country regarding the three sets of directives could be to a certain extent described as a little tense because of the non-implementation of the second pillar directives. Instead of solving huge problems, especially regarding the first pillar and also some problems regarding the third pillar, there is pressure on the State institutions to implement the second pillar directives possibly by introducing a second pillar system. In the current situation this is almost impossible from a political point of view. If there had been just one set of directives on social security systems as a whole, the situation could have been easier.

## DENMARK

Ruth Nielsen

### I. Directive 79/7/EEC

In connection with the implementation of Directive 79/7, Denmark revised its social security legislation to make it sex neutral with effect from 1984. Before this, the qualifying age for the general statutory old age pension (folkepension) was 67 for men and married women and 62 for unmarried women. This age was made sex neutral and fixed at 67 for everyone. It was later lowered to 65. Married men whose spouses were between 64 and 67 were entitled to a wife benefit. This benefit was abolished. There was also a special Act concerning widow's pensions. This Act was repealed and widow's pensions were also abolished. Denmark therefore did not opt to make use of the possibilities for derogation provided by the Directive, but instead chose to make its social security legislation completely sex neutral.

#### a) General scope of the Directive

1. *Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC?*

*If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

- Sickness: the Sickness Benefit Act.
- Invalidity: the Act on Social Pensions (which provides for old-age pension and anticipatory pension. Persons who are disabled will qualify for anticipatory pension).
- Old age: the Act on Social Pensions (which provides for old-age pension and anticipatory pension. Persons over 65 are entitled to old-age pension) and the Labour Market Supplementary Pension Scheme (ATP) Act.
- Accidents at work and occupational diseases: the Act on Protection against the Consequences of Industrial Injuries and occupational diseases.
- Unemployment: the Unemployment Benefit Act or (for persons who are not members of an unemployment benefit scheme) cash assistance under the Act on Active Social Policy.

2. *As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue*

- *sickness*: everyone in employment and some self-employed.
- *invalidity and old age*: the Act on Social Pensions covers the whole population and the Labour Market Supplementary Pension Scheme (ATP) Act everyone in employment with a working time of at least 10 hours a week.
- *accidents at work and occupational diseases*: the Act on Protection against the Consequences of Industrial Injuries and occupational diseases covers everyone in employment.

- *Unemployment*: the Unemployment Benefit Act covers members of an unemployment benefit scheme. The remainder of the unemployed are covered by the Act on Active Social Policy (which generally covers the whole population).

3. *What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e. are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

The Labour Market Supplementary Pension Scheme (ATP) excludes persons with a working time of less than 10 hours a week.

4. *In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

There are probably no instances where especially women are excluded.

6. *How could this situation be amended?*

There is no need to amend the situation.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. *Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

There are gender specific benefits during pregnancy, maternity and paternity under the Maternity, Paternity and Parental Leave and Benefit Act, apart from that family and survivors' benefits are gender neutral in Denmark.

2. *Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Art 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

Denmark has not made use of Article 7 (1) of Directive 79/7/EEC.

3. *What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

Pregnancy, maternity and paternity are the only domains where benefits are gender-related in Denmark.

4. *Should these exclusions in your opinion be repealed? Please specify, which and why.*

I think, the gender-related pregnancy, maternity and paternity benefits should be upheld and as regards paternity benefits maybe extended in order to motivate men to take paternity/parental leave. The woman-specific pregnancy and maternity benefits are necessary to protect the woman and the (coming) child.

#### **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

In Denmark most occupational pension schemes are defined contribution schemes. One or two generations ago, most pension schemes used actuarial calculations which were gender-related in such a way as to result in women receiving smaller monthly benefits than men for whom the same contributions had been paid. During the last 25 years or thereabouts the trend has been shifting.

A number of new pension schemes were established in connection with the renewal of collective agreements in 1989 and 1993. Most of these schemes use actuarial calculations that result in women receiving the same monthly benefits as men for whom identical contributions have been paid. This is known as the unisex basis of actuarial calculations. A few older schemes, for example the one applying to lawyers, have also adopted the unisex calculation.

On 30 October 1997, a new Act providing for unisex pension schemes was proposed. The Act was adopted in February 1998 and promulgated as Act no. 134 of 25 February 1998 on the Equal Treatment of Men and Women under Occupational Pension Schemes. The Act entered into force on 1 March 1998.

The main provision of the Act is Section 8 which prohibits provisions in pension schemes according to which men and women are treated differently on grounds of sex as regards determination and calculation of contributions and benefits.

Of special importance is that the Act prohibits both different contributions and different benefits, also in cases where the reason for different treatment is actuarial factors. However, the prohibition of sexual differentiation on grounds of actuarial factors only applies to workers who joined the scheme after 1 July 1999.

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

No, the Labour Market Supplementary Pension Scheme (ATP) Act which I – above - have listed as covered by Directive 97/7/EEC is arguably rather an example of a pillar 2 scheme covered by Directive 86/378/EEC as amended by Directive 96/97/EC.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillar targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

Most workers whose wages are covered by collective agreements will be covered by occupational pensions schemes in the second pillar, probably around 70-80 % of the work-force. There is probably no significant difference in the coverage of men and women.

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

As mentioned above, Denmark has adopted an Act on Equal Treatment of Men and Women under Occupational Pension Schemes which came into force 1 March 1998. The Act prohibits both different contributions and different benefits, also in cases where the reason for the difference is actuarial factors. However, the prohibition of sexual differentiation on grounds of actuarial factors only applies to workers who joined the scheme after 1 July 1999.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

In Denmark, most occupational pension schemes are defined contribution schemes.

*5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

Retirement ages have been the same for men and women in Denmark for generations. The above problem is therefore not really relevant.

### **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

In respect of Denmark, by and large, yes.

2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?

I think the second and third pillar should be better aligned. In Denmark, use of actuarial factors as justification for different treatment of men and women is – as appears from the above – unlawful in the second pillar (for persons joining since 1999) while such use is widely regarded as lawful in the third pillar. In my view, it should be prohibited also in the third pillar.

## ESTONIA

Anneli Albi

### I. Directive 79/7/EEC

#### a) General scope of the Directive

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

As regards pensions,<sup>3</sup> the first two pillars of the Estonian pension system fall within the scope of Directive 79/7. In Estonia, pension reforms were carried out in 1999-2002, resulting in a three-pillar pension system, which is composed of the mandatory state pension insurance, mandatory funded pension and supplementary private pension. Pensions are regulated by the following Acts in Estonia: State Pension Insurance Act, Earned Years Pensions Act, Favourable Conditions Pensions Act, Funded Pensions Act, and Acts which establish an entitlement to a special pension in certain professions, such as Courts Act and Police Service Act.

The first pillar, state pension insurance, is based on pay-as-you-go financing and covers three social risks: old age, permanent incapacity for work and loss of a provider. This pension consists of two components: (a) national fixed-rate pensions ensured for all residents of Estonia, and (b) old-age, incapacity-for-work and survivor's pensions based on former work input, including length of service and social tax paid by the employer or the self-employed person. However, for persons who have entered the labour market since 1999, old age pension rights are acquired only on basis of social tax paid.

The second pillar, mandatory funded pensions, was launched in 2002 and is based on full pre-financing; it covers the risk of old age only. Estonia's second pillar is not an occupational scheme, and thus the retirement age in the second pillar is the same as in the first pillar.<sup>4</sup> The second pillar pension funds are administered by private asset management companies. In essence, the second pillar is an individual savings scheme, where the size of pension depends on the total contributions over the career and rate of return of the pension fund. Participation in the second pillar is mandatory for persons born in 1983 or later. Persons born prior to 1983 and participating at the labour market can join the second pillar on a voluntary basis. The rate of the second pillar contribution is 6 % of the wages; the employee pays 2 % from gross wages, which is supplemented by the state by 4 % of gross wage on the account of social tax paid by the employer. Since there is a qualification period of 5 years, the payment of first benefits is expected to commence in 2009.

The third pillar, supplementary voluntary funded pension, became operative in 1998 and consists of supplementary funded pension schemes based on pre-financing. The state encourages participation in such schemes with tax incentives. The third pillar covers two social risks: old age and permanent incapacity to work. The third pillar pension schemes are offered by voluntary pension funds and life insurance companies. The payment of benefits will not commence before 55 years of age.

The legal criteria are equal in respect of men and women, except for the pensionable age in both the first and the second pillar (see the answer to point I.B.2).

<sup>3</sup> Information regarding pensions in this report is predominantly based on the following documents: 'Euroopa Liidu ühiste pensionieesmärkide mõju Eesti pensionisüsteemile' (The impact of the European Union's common objectives in pensions upon the Estonian pensions system), 'Poliitikauuringute Keskus PRAXIS' (Tallinn, April 2004), p. 83 (hereinafter 'Praxis Report'), and '2005 National Strategy Report on Adequate and Sustainable Pensions; Estonia', Report composed by the Ministry of Social Affairs of the Republic of Estonia, available at <http://www.sm.ee> (hereinafter 'Ministry of Social Affairs 2005 Report').

<sup>4</sup> Ministry of Social Affairs 2005 Report, supra note 3).

Sickness insurance is regulated by the Health Insurance Act. Under Article 5, an insured person is a permanent resident of Estonia or a person living in Estonia on the basis of a temporary residence permit, for whom a payer of social tax is required to pay social tax or who pays social tax for himself or herself (e.g. the self-employed) pursuant to the procedure. In addition, certain other categories of persons are treated as insured.

Unemployment benefit is regulated by the Social Protection of the Unemployed Act 2000 and Unemployment Insurance Act 2001. Directive 79/7 extends to these acts; the rules are gender neutral; women and men are treated equally in calculation and payment of benefits and contributions.<sup>5</sup>

All the above areas are included within the scope of the Gender Equality Act 2004, which applies to 'all areas of social life' (Article 2); a footnote attached to the title of the Gender Equality Act mentions that the Act, *inter alia*, is meant to implement Directives 79/7, 86/378 and 96/97.

*2. As regards the above-mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

According to the Ministry of Social Affairs 2005 Report,<sup>6</sup> the state pension coverage is practically universal. Approximately 97 % of men and 99 % of women who are residents and have reached the pensionable age are in receipt of pension from the State. The majority of the rest receive pension from another country (mainly from the Russian Federation).

As regards sickness insurance, 94 % of the population was covered by sickness insurance in 2005.<sup>7</sup> In 2007, the insurance was extended to all persons who have registered themselves as unemployed. The Government's Action Plan for 2007 envisages that 99 % of the population will be covered by 2008.<sup>8</sup>

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

At present, the first pillar of the Estonian pension scheme, state pension insurance, includes minimum pension guarantees. All persons of at least 63 years of age, who have been residents of Estonia for at least five last years prior to applying for pension, have a right to national pension, including those elderly persons whose length of employment is very short or whose income subject to social tax has been very low during the entire career.<sup>9</sup>

*4. In which areas and to what extent especially women are excluded from benefits, from access to the schemes or from more generous benefits?*

As regards the pensions of those persons who qualified for pension before 1999, the average old age pensions are broadly equal between women and men; the pension of women comprises nearly 97 % of the average old age pension of men. This is because until 1999, pension rights were determined only on the basis of the length of service, while at the same time the employment rate of women has been relatively high. Furthermore, until 1999 one of the parents was granted an additional 2 years of service per each child. However, since 1999, pensions are more closely connected with working and remuneration-related payments, with the first pillar being dependent on the social insurance tax payments and the second pillar on salary and social insurance tax payments. At the same time, wage differences in the age cohorts approaching the retirement age are nearly 20 %. This, coupled with periods taken off by women in connection with raising children, appears to carry the risk of women receiving a lower pension in comparison with men. The gaps in the accumulation period of the second pillar pension for women due to raising children are somewhat compensated by supplementary contributions by the state (launched in 2004), which amount to 1% of the parental benefit. These supplementary contributions by the state are made during the period of receiving the parental benefit, which is up to 15 months. However, such contributions still comprise only 1/6<sup>th</sup> of the former contributions from the parent's former work income.

<sup>5</sup> R. Leetma, L. Leppik, P. Liimal, 'Töötuskindlustus – teooriast ja praktikast' ('Unemployment insurance – about the theory and practice'). *Praxis*, 2004, <http://www.tootukassa.ee>, p. 54.

<sup>6</sup> Ministry of Social Affairs 2005 Report, *supra* note 3), p. 12.

<sup>7</sup> Government's Action Plan for 2007, [http://www.valitsus.ee/failid/2006\\_10\\_12\\_MTTK\\_Rakendusplaan\\_2007.xls](http://www.valitsus.ee/failid/2006_10_12_MTTK_Rakendusplaan_2007.xls).

<sup>8</sup> Government's Action Plan for 2007, [http://www.valitsus.ee/failid/2006\\_10\\_12\\_MTTK\\_Rakendusplaan\\_2007.xls](http://www.valitsus.ee/failid/2006_10_12_MTTK_Rakendusplaan_2007.xls).

<sup>9</sup> Ministry of Social Affairs 2005 Report, *supra* note 3), p. 14.



Furthermore, additional contributions are not made during the period of maternity benefit (approximately 4.5 months), paid on the basis of the Health Insurance Act.<sup>10</sup>

As regards the state pensions, it has additionally been pointed out that approximately 7 % of those reaching the retirement age and having received minimum or very low wages may have problems in the future as regards fulfilling the required qualification period of 15 years.<sup>11</sup> This problem concerns primarily those workers who have received minimum or very low wages, plus persons who have been economically non-active for longer periods, including parents staying several years on parental leave. The social tax paid by the state for persons on parental leave has been low; the longer a person stays away from the labour market due to raising children, the smaller would thus be the old age pension, which would be considerably lower than the average or even just the minimum rate.

It should also be noted that some legislative amendments came into effect in January 2006 to eliminate some discriminatory provisions that had been highlighted, *inter alia*, in a research report by the Praxis Centre for Political Studies.<sup>12</sup> The Earned Years Pensions Act contained disparities with the Directive by establishing for women in some professions (e.g. textile, air crew and ship crew) a shorter minimum working period than to men in order to be entitled to a pension. Since such a working period was not related to the retirement age, it was considered not to fall under the transitional period allowed by the Directive; relevant provisions were indeed amended by the legislature in the end of 2005, equalising the eligible working periods for men and women.

#### *6. How could this situation be amended?*

As the Ministry of Social Affairs notes,<sup>13</sup> the Estonian Government plans to gradually increase the social tax paid to the pension system by the State for inactive people. This plan aims to extend the pension rights granted for the periods of absence from the labour market, and thus alleviate the negative impact of child-care related absences from the labour market on the amount of the pension.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

No specific measures have been taken.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

The retirement age is currently 63 for men and 59 for women; the women's retirement age will rise and will be equalised with that of men by 2016, in line with the transitional scale permitted in Directive 79/7. Relevant legislative amendments were adopted in 2006.

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

See the answer to the previous question.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

As seen above, the pensionable age will be gradually equalised by 2016.

#### **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

As the Report by Praxis points out,<sup>14</sup> the second pillar of the Estonian pensions system may prompt questions as to whether it might qualify as an occupational scheme rather than a state pension scheme; however it is treated as a state pension scheme where, as with the first pillar, the qualifying age will be gradually equalised by 2016.

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<sup>10</sup> Ministry of Social Affairs 2005 Report, supra note 3), p. 26; Praxis Report, supra note 3), p. 87.

<sup>11</sup> Praxis Report, supra note 3), p. 18.

<sup>12</sup> Praxis Report, supra note 3), p. 83.

<sup>13</sup> Ministry of Social Affairs 2005 Report, supra note 3), p. 19.

<sup>14</sup> Ministry of Social Affairs 2005 Report, supra note 3), p. 84.

2. *What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

This question appears to be inapplicable to Estonia; as explained in Point II.1, the first and the second pillars fall under Directive 79/7 and the third pillar lies in private pension savings.

3. *To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

See the answer to the previous question.

4. *Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

The trend appears to be towards contribution-based approach.

5. *Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

There have been no such developments.

### **III. The three pillar system as a whole**

1. *Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

As explained above, the pillars of the Estonian pensions system are treated for the purposes of EC law as first (state) and third pillar (private) pensions, with none being regarded as occupational pensions.

2. *Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

It appears that a more systematic assessment of the pensions system in terms of ensuring gender equality is necessary in Estonia, especially as regards the negative effect of child-care related absences on the eventual pension entitlement.

As regards the third pillar, insurance companies have expressed concern with regard to the envisaged equal treatment of men and women in private pensions, since this would render pensions insurance more expensive both for men and women. The difference in the life expectancy of men and women is very high in Estonia, resulting in a price difference of around 30 %. In 2003, the life expectancy was 66.0 for men and 76.9 for women; the share of women among residents aged 65 and over was 67 %, and among those aged 75 and over 74 %. The respective average shares for the whole EU were ca 60 % and 67 %; the share of women in the elderly population in Estonia is thus higher than the EU average.<sup>15</sup>

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<sup>15</sup> The statistics is based on Ministry of Social Affairs 2005 Report, supra note 3), p. 25.

## FINLAND

*Kevät Nousiainen*

### I Directive 79/7/EEC

#### a) General Scope of the Directive

1. The Finnish pension system does not fit very well into the EU pillar system, because the main statutory and compulsory pension schemes are related to a person's occupational activity. The national pension scheme supplements the social security of those that fall outside the compulsory employment related schemes. The right to national pension under National Pensions Act (347/1956) is residence based, see Act on the Application of Residence-Based Social Security Legislation (1573/1993) and National Pensions Act, Section 23. The pension can be adjusted on the basis of the period of residence, Section 25b. The National Pensions Act also covers refugees, those who have been granted asylum, their family members and stateless persons, Section 1 d. If the sum to be paid would be very small, national pension is not paid, Section 23 a. When the amount of the pension to be paid is specified, certain continuous payments, pensions and compensations are taken into account, Sections 26 and 27. National Pensions Act also provides pensions for the disabled and those unemployed who are born before 1950, and are already 60 but not yet 65 and are not entitled to other statutory pensions. The Sickness Insurance Act 2004/1224 is also residence based, Chapter 1 Section 2. The Act covers the costs of illness that exceed a certain sum, and supplements thus pension schemes.

The main statutory pensions cover both private and public occupations. The public employees are covered by the State Employees' Pension Act (1295/2006), the Municipal Employees' Pension Act (549/2003), the Pension Act of the Evangelic-Lutheran Church (296/1966), the pension rules based on the Act on the Orthodox Church (521/1966), the pension rules of the National Pension Institute Act (731/2001) and the pension rule in Section 2 Subsection 6 of the Act on Bank of Finland (214/1998), and the Act of the County of Åland on the implementation of certain rules on state pensions in the County of Åland (ÅFS 4/1997). Private sector employees are covered by the Act on Employees' Pensions (2006/395), Act on Sailors' Pension (1290/2006), Act on Entrepreneurs' Pensions employment based pension schemes require a minimum employment and income as (1272/2006), and the Agricultural Entrepreneurs' Pension Act (1280/2006). Beside old age pensions, the employment related pension schemes contain provisions on rehabilitation, disability and family pension schemes, as well as part time pension schemes.

The employment based pension schemes are both statutory and compulsory, and therefore they are for general purposes relegated under the first pillar in the EU system of pensions. In this respect, the Act on State Employees' Pensions is similar to the private sector Act on Employees' Pensions in its general outline and relevant provisions. The European Court of Justice has decided that the Finnish state pension scheme falls under the second pillar, however. In that sense it is difficult to see why other similar schemes should fall under the first pillar for purposes of gender equality.

2. The aim of the Finnish legislation on pension schemes has been to establish a covering and universal system, consisting of a labour market income based pensions and a universal pension (national pension) for those who do not gain an acceptable level of pension through the employment related pension schemes. There are no statistics available on the possible failures of the system's assumedly universal coverage. It may be that persons only residing in Finland for shorter periods may fall outside the system's scope, but their number cannot be even estimated.

3. According to the ideology of the universal national pension scheme, there should be no persons excluded from the scheme. If and when the employment related schemes are also taken into account as statutory pensions under the first pillar, then there are some exclusions from the rule that widely speaking employed persons are also covered by an employment related pension scheme. The Finnish employment related statutory schemes cover entrepreneurs and agricultural entrepreneurs, and thus most self-employed persons. The persons who work on scholarship are at the moment excluded from the employment related pension schemes. The latest proposal for including those working on scholarship aimed at using the entrepreneurs' pension scheme for those enjoying stipends. The proposal did not lead to a Government Bill, however, as the level of pensions under such a scheme was estimated to remain low. The persons working on scholarships are usually artists and scholars, the latter consisting of both doctoral students and those doing post-doctoral research. The national pension scheme covers these persons, but does not provide a comparable level of benefits with employment related pensions.

4. As there is no information about people possibly remaining altogether outside the pension scheme system, it is impossible to say whether they would be women or men. There is no data on the gender of the persons working on scholarships and thus remaining outside the employment related pension schemes. There is some reason to believe, however, that women would fall on the stipend system more often than men at least in research. Women find it more difficult to obtain university teaching positions and other proper employment in research, and may for that reason more often work on a stipend.

6. There should be more information on the de facto coverage of the national pension scheme, and on the people who fall outside. The position of those on grants, stipends or scholarships is generally admitted to be problematic, and is becoming a political issue.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1 The family pension schemes have been made gender neutral, including those that originally were only meant for widows and not for widowers, see for example Chapter 4 of the State Employees' Pension Act or Sections 54-62 of the Employees' Pension Act.

2. The employment related pension schemes give advantages to persons who have brought up children. Such unpaid periods that are caused by family related leaves (maternity, paternity and parental leave) are calculated into the period taken into account in defining the amount of the pension. For example, under Section 74 of the Act on Employees' Pensions, the 117 % of the income from the benefit paid for those on family related leave is taken into account. Also a period spent on so-called home care leave (during which only a flat rate allowance is paid and which can be had until the child become 3 years old) is taken into account, but on a lower calculation, which is not comparable to labour market related income. The state pension scheme is more generous in this respect. If a person has attained a stable level of income before child care leave, and his/her income drops for more than 20 %, the income is to be calculated on the level it was before the person' home care leave, Section 62 of the State Employees' Pension Act. The provisions for persons on family related leaves improved when the employment related pensions scheme legislation was amended some years ago.

3. Mothers use the family related leaves much more frequently than men do. It was an improvement that these leaves are calculated into the period entitling a person to pension after the legislation on employment related pensions was lately amended. The compensation for the time spent with infants and small children does not even now come to the level of time spent on the labour market for most employees, however.

4. There is room for improvement (see 3), but because the reform of the pension system has just taken place it is unlikely that it would come on the agenda again in the near future.

**II Directive 86/378/EEC as amended by directive 96/97/EC**

1. As already indicated above, it is not possible to distinguish between the Finnish statutory pension schemes and occupational schemes in a way that would make sense from the point of view of pay and gender equality. The main pension schemes related to one's occupational activity are statutory and compulsory, and the occupational pensions in the sense of the second pillar EU pension ideology have become practically obsolete. There are still small numbers of old persons enjoying the occupational pension schemes that were in place before the introduction of the statutory pension schemes, but their number diminishes. To the purposes of pensions related to pay, the statutory pensions are central.

2. See above. The number of both women and men is small.

3. There is no information available on the terms of the remaining occupational pension schemes. Here it may be more relevant to note that actuarial factors are not used in the pension schemes under the first pillar. Both contributions and the benefits are gender neutral, although the calculations used in defining the necessary level of contributions paid by the parties involved may be calculated in a manner that takes into account the longer life expectancy of women and similar factors, but the employer and employee contributions are defined in a gender neutral manner on the statutory basis.

4. Again, there is no information on occupational pensions in the sense of the EU pillar system. The statutory employment related pension schemes define the level of the contribution as well as the level of the benefits.

5. The Finnish pension scheme for military personnel under the State Employees' Pension Act of 1966 (1966/280) defined an earlier retirement age for men than for women. The small amount of women in military employment at that time held posts that did not require military training. The Act differentiated persons entitled to pensions on the ground of sex. In Niemi (C-351/00) the European Court of Justice decided that the Finnish state pension system fell under the second pillar, and that the pension was thus to be considered pay under Article 141 EC. The Finnish Insurance Court consequently decided that the pensions of the military personnel were to be equalized, and that Ms. Niemi had the right to choose which pension age she wished to have.<sup>16</sup> As Ms. Niemi wanted to have foreknowledge of her position, the question of retroactive effect did not arise in that context. The State Employees' Pension Act of 1966 was repealed by State Employees' Pension Act of 2006 (1295/2006). The latter Act contains provisions on military pensions in Chapter 5. Now the criteria for the lower retirement age is military training, not sex. There still are few women with military training, and few women officials qualify for the requirements of military pensions, but the provisions are no longer directly discriminatory.

There still is no piece of legislation that would have provided reconsideration for the 'old' pensions preceding the Finnish EC membership, or provided a retroactive effect for persons possibly discriminated against under the State Employees' Pension Act of 1966. The number of such persons is estimated to be small, because the gender segregated pension ages only applied to military personnel, and women rarely held such positions at the time when military service had not yet been opened to women.

### **III The three pillar system as a whole**

The three pillar system may serve some useful purpose in differentiating the pension schemes in Europe at large. As to the Finnish pension system, it is confusing. Especially for purposes of equality legislation, it makes little sense to consider the state pension scheme under the second pillar and the other equivalent schemes under the first pillar.

From the Finnish perspective, it would make extend the demand of non-discrimination to all employment related pension schemes. Use of actuarial factors and differentiated contributions is still seen as justified in Finland in third pillar private insurance based pension schemes. The private pensions schemes were but rarely used until ca. 10 years ago. Now, both private insurance pensions as such and private insurance pension as a part of individual employment agreement are becoming more usual. The development raises the issue of gender equality: women have less private funds to spend on private insurance pensions, and they are in all probability less often able to negotiate a private scheme with their employer.

## **FRANCE**

*Hélène Masse-Dessen and Marie-Therese Lanquetin*

The French social welfare system is characterized by the existence of an inter-professional social welfare general scheme for employees covering most of the employees working in the private sector. Other schemes are attached to this general scheme (agricultural plan, non-employee non-agricultural). The general scheme was set up in 1946 and constitutes the first pillar.

There remains for other professions, some other special schemes that pre-existed the set-up of the general scheme and did not wish to be attached to it. The question being asked is of their legal nature. For civil servants, this question has been answered by the Griesmar case which qualifies their scheme as a professional one.

Many of the special schemes have disappeared and the employees belonging to those have been benefiting from the general scheme.

Aside from these schemes, there are some complementary schemes for old age which constitute the second pillar of the French welfare system.

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<sup>16</sup> Insurance Court, no. 2276:96/ 25 February 2003.

## I. Directive 79/7/EEC

### a) General scope of the Directive

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?

3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment) ?

4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?

The general welfare scheme brings to 'the worker and his family' welfare protection in case of sickness, maternity, disability, old age and death. In order to receive in-kind and cash benefits, one must meet the entitlement requirements attached to the professional activity.

But regarding welfare protection in case of sickness, one must set aside the question of in-kind benefits, meaning access to care.

- The working employee must have contributed a certain number of hours for a reference period. In which case, the spouse and children will be covered and under certain conditions, parents will be covered as well. These are family rights.
- These conditions are reduced regarding employees with precarious employment and part-time employment. (A March 27, 1993 decree reduced the conditions for the named above categories of individuals).
- Finally, there is a contingent system, the universal medical coverage (UMC), when the other mechanisms are not in place.

The UMC was created by the July 27, 1999 law in order to guarantee 'an equal access to care'. The goal is to bring a basic and complementary free medical protection for resourceless people. At first, the UMC aimed at the 150,000 people excluded from every basic plan. There is today, 1.7 million people receiving the basic UMC.

The UMC does not create a universal plan but allows to generalize the French social welfare. It contains 2 parts:

- the mandatory linking up to the sickness insurance of the general scheme based on a residence criteria of at least 3 months (steady and regular residence).
  - without contribution up to a yearly income ceiling. Currently this ceiling is at 6,965 euro per year.
  - with contribution, it is assessed at 8 % above this ceiling.

Some people are exonerated, notably the beneficiaries of a family benefit, of people receiving housing support and benefits from family policy. The beneficiaries of a non-contributing old age benefit, people receiving a minimum government supported fixed income, the beneficiaries of social welfare for families, disability beneficiaries and old age beneficiaries. It is a personal right. For separated women and for dependent adult children, there is even the notion of 'autonomous rightful beneficiary', which allows to provide a basic welfare protection notably to the woman who does not work or works a low number of hours.

Aliens (outside of the EU) must prove their legal status.

- Free access to a complementary sickness protection. The residence criteria (of less than 3 months) also applies but is not opposable to some people (adult disability beneficiary, unemployment beneficiary, and beneficiary of the government supported fixed minimum income). This complementary protection is based on income resources. The income ceiling is revised every year and is based on the household situation and who is considered a dependent (employment seeker, spouse, except if filling taxes separately, *de facto* spouse, partners having entered into the PACS legal contract, children under the age of 25 or dependents living in the household, children over the age of 25 or dependents but not living in the household and receiving a pension). This ceiling is of 598.23 euro a month for one person and varies according to the number of people under his/her financial care. This complementary protection is afforded for a one-year renewable period.

The incomes taken into consideration are the ones after mandatory social security withholdings and other various withholdings.

The complementary protection fully covers the co-payment and the hospital fee without time limitation (meaning what is left to be paid by the beneficiary).

In 2005, 4.7 million people were covered under this scheme.

The system is relatively complex. For example, a person can be covered under the general scheme, under the residence criteria but without being able to have access to the free complementary coverage because of his income situation. A person covered under the general scheme because of his professional activity can benefit from the free complementary coverage if his income is below the income ceiling. This system answers the issue of people working a low number of hours. But the system is also creating two types of difficulties:

- The effects of income ceilings and the annual review of income
- The refusal by some physicians to care for patients benefiting from the UMC because of the heavy administrative paperwork (current problem which became the object of reminders from different instances, Conseil de l'Ordre and one recommendation from the HALDE to acknowledge the right to healthcare).

Regarding the cash benefits regarding risks, men and women can have access to it if they meet the requirements to receive these benefits. They are about the length of employment and the amount of necessary contributions.

- Regarding unemployment risk, its coverage was not regulated by the law but by collective inter-professional agreements, the first one dating from 1958. The first one is an insurance system. This system was modified several times to take the amount of unemployment into consideration. Men and women are treated equally but unemployment is affecting women more. Some specific dispositions regarding times of interrupted professional activity were criticized regarding the equality issue.

Beyond the expiration of rights, two solidarity benefits apply:

- The specific solidarity benefit. It is a minimal income guaranteed by the state when the employee's rights to unemployment come to an end.
- The integration benefit. This benefit, under certain income conditions, is for employment seekers who do not meet the time requirement to receive insurance benefits and the basic benefits. They have to be registered as employment seekers and show positive actions to secure employment.

#### *6. How could this situation be amended?*

This discussion is mostly about access to care under the sickness insurance. The system in place is both about insurance and support, with some breach of equality. The system is one of payment for each medical consultation and authorizes some charges above the fixed rates. This does not help to respect the principle of free access to care under the UMC. The different steps effects cause breach in the coverage of sickness risk.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

- Under the general scheme and the assimilated schemes, the survivor's benefits have evolved since the August 21, 2003 law reforming retirement schemes

The law cancelled the minimum age criteria progressively until 2011. This minimum age was 55 years old. In parallel, this implied the cancellation of the widowhood benefit insurance. The law also cancelled the criteria of the length of marriage and the criteria of non-remarriage in case of divorce. The survivor's benefit is under the condition of income but 2 income ceilings exist. A one-person income ceiling of 2080 times of the hourly minimum wage (SMIC) and a couple income ceiling of 3328 times of the hourly minimum wage (SMIC).

- Regarding family benefits.

They are universal. The issue of the sharing of some benefits in case of joint custody after divorce exists. The issue is evolving.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?

4.. Should these exclusions in your opinion be repealed? Please specify, which and why.

2 - Regarding the retirement age: there is equality since the age for the right to retirement is 60. However, the number of necessary annuities to benefit from a full retirement is of 40 annuities, which is difficult to reach for women and especially since the reference period for the calculation of the retirement amount is based on the 25 best years. Among these years, there are not always some good years. And adding to this are some discount and agio mechanisms if the annuity numbers are not reached or if the employee wants to continue to work.

- Family benefits in regard to raising children and its impact on retirement:

Under the general social security plan, women who have raised one or more children, whether they interrupted their professional activity or not, are entitled to a two-year bonus per child. Article L. 351-4 CSS.

When a father was claiming the same benefit, based on directive 79/7, the judge was refusing this benefit since it was not constituting a 'compensation' under the meaning of Article 141 EC treaty (Cass. Civ. 2, 15 June 2004). The existence of this benefit was discussed again with the retirement reform under the general social security plan with the 21 August 2003 law. The legislator chose to maintain that benefit for the mothers. And following litigation to the *Conseil Constitutionnel*, the legislator justified its position by saying that although benefits regarding raising children should not be dependent on parents' gender, it was the role of the legislator to take into account the de facto inequalities that women had been the targets of (shorter length of professional activity, smaller pensions, etc....) and that should normally disappear.

However, a father brought litigation to receive this benefit, based on article 14 of the European Convention of Human Rights. On 21 December 2006 the *Cour de Cassation* agreed with him. The court agrees that this benefit has a patrimonial interest under the scope of article 1 of protocol 1 of the ECHR. Therefore, a difference of treatment between men and women who have raised children under the same circumstances can only be accepted if a reasonable and objective justification exists. A father had proven that he had raised his child alone and the benefit was given to both women who had worked without interruption and those who stopped working for a while. This solution is meeting the Griesmar jurisprudence of the CJEC. The 21 August 2003 law did not want to take fathers' situation, who raised their child (children) into consideration. The 21 December 2006 jurisprudence is rejecting this difference in treatment and the law must now take this into consideration. However, this decision calls for caution as one can fear it to be the excuse to stop women from receiving a benefit necessary to maintain a minimal pension.

- The beneficiaries, father or mother, who are raising a child with a disability receive an increase of their insurance coverage length of one trimester per raising period length of 30 months with a maximum of 8 trimesters (Article L. 351-4-1 CSS).
- in case of interrupted activity, the parent who remains at home can benefit from the homemaker old age insurance. Some conditions must be met: to be the beneficiary of certain family benefits, to have income below a certain ceiling, to have dependent children, their number and age being decided by a decree. The contributions are then paid by the family branch of the system, in reference to the minimum wage. This insurance is mostly covering women because of the low level of retirement expected! An indirect discrimination argument could be made because it is mostly women with low wages who are described in this situation.
- in the event of parental leave for either of the parents, the code offers parents a choice of the most advantageous solution (L.351-4 and L.351-5 CSS).
- Starting with the third child, there is an increase of 10% for each parent. But this benefit is inequitable or even discriminatory as it is based on previous compensation.

Increase for a dependent spouse (Article L.351-13 CSS):

The dependent spouse of the beneficiary of a pension can give right to an increase under some strict conditions: to be at least 65 years-old (or between 60 and 65 in case of inability to work), to receive no old age or disability benefits on his/her own or from a previous spouse, and to not have income above a certain ceiling. The increase of €610 is fully paid to beneficiaries receiving a full pension. Otherwise, its payment is prorated.

Regarding disability benefits:

The disabled person receives a disability benefit if his/her disability is of 2/3 and also receives in-kind benefit for medical and maternity coverage for himself/herself and his/her family and is exonerated from paying the co-payment.



In case of death, the surviving spouse, if himself/herself is also disabled but does not receive his/her own pension, will benefit from a derived pension. Therefore, the surviving spouse must also have a disability which would entitle him/her to a disability pension. He/she cannot be remarried. If he/she remarries, the pension is cancelled. He/she must be at least 55, age at which the pension becomes a widower pension of the same amount. This system is not treating disabled people well and forces them to seek complementary insurance. It is a very archaic system.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

The distinction remains difficult to make and cannot be considered entirely solved.

The first pillar encompasses the legal schemes and the mandatory complementary schemes for employees and non-employees.

The non-employee, non-agricultural mandatory complementary schemes were created by institutions managing the basic schemes and are considered part of the first pillar.

The employee mandatory complementary schemes were created by certified inter-professional agreements or by legal creation (AGIRC, ARRCO). These schemes are generalized and work under the distribution rules. Their source is collective agreements (certified by the state). They are old, and very important in the French system. These schemes are under important scrutiny from the state and tend to encompass smaller schemes disappearing.

These schemes fell under the scope of regulation 1408/71 on 1 January 2000 (regulation memorandum DSS/DAEI of 8 December 1999 and 12 July 2000) but remain considered as professional schemes.

For the civil servants' schemes the issue was solved by the GRIESMAR case as the civil servants' pensions are assimilated to compensations. For the special schemes, they are generally considered like professional schemes but litigations are pending and should be resolved soon. For example, the *Conseil D'Etat* decided that the schemes for *Electricité et Gaz de France*, *Banque de France* and *SNCF* are assimilated to the civil servants scheme in regard to the application of the equality principle. However, some strong resistance remains.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

The answer to this question is difficult to make because of the uncertainty of the previous question. The complementary schemes are mandatory and apply to almost all workers, who are also under the basic scheme.

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

To our knowledge the actuarial factors are not taken into consideration for the second pillar.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

One must make a distinction between the special schemes and the complementary professional schemes. The schemes are all defined-benefits schemes. There are few exceptions for certain company plans and notably for executive officers.

The traditional complementary schemes work under the distribution system. It is different for only few company schemes.

5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?

There have not been any 'retroactive' modifications for the already liquidated pensions. However, the benefits are calculated at the time the pension is being liquidated, including the lengths of insurance and the old age (*anciennete*) increases and bonuses.

The result has been, notably for women civil servants, that those whose retirement has been liquidated after the implementation of the new regulation have lost some of the benefits they could have expected.

Therefore, the effect of the jurisprudence, as interpreted by the French legislator, has had a negative effect for women (bonuses for children under new conditions, notably regarding the children's birth date, which must be after the start date of the work of the employee).

This negative equalization, presented as being imposed by the European Union has resulted in strong criticism. This unification has been used as an excuse for certain steps back that were not easily accepted. Following the GRIESMAR case the implementation of the new dispositions has created new discriminations against women (cf. MT LANQUETIN, "les retraites des femmes, quelle égalité? *Droit Social*, Novembre 2003, p. 960).

Regarding the complementary schemes, for which the PODESTA case of May 25, 2000 has decided that it needed to align with the BARBER case, they have a difficult time to distinguish between the insurance periods. This distinction is hardly compatible with the distribution technique.

### III. The three pillar system as a whole

1. *Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

The difference between the first two pillars is subsidizing because of the jurisprudence from the European Court of Human Rights. And it is difficult to accept the difference between the first and the second pillar in regard to equality when the affiliation to one scheme or another depends on the nature of the professional activity.

However, the French system is characterized by the co-existence of mandatory complementary schemes and mostly generalized for employees and does not go well with the two-pillar system. Thus, some permanent difficulties.

The most important schemes are based on the distribution system (first and second pillar), which is hardly compatible with the distinctions made in the directives.

The distinction between legal and professional schemes is too theoretical. It does not take into account the complex historical construction of the protection schemes. The distinction brings complexity and misunderstanding and one can question its usefulness. One must admit that the directives are regarding a family model that has evolved.

2. *Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

Same answer as above.

## GERMANY

Dagmar Schiek

Unfortunately, I have to start this report again with a preliminary remark. German social law is a very complicated field, which comprises approximately 800 Acts and statutory instruments.<sup>17</sup>

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<sup>17</sup> See Kittner/Kittner, *Arbeits- und Sozialordnung*, 32 ed 2007, 973.

Accordingly, a full report on the questions below would require much more time than available under the modest contract granted to the experts of the 'network'. Ofcourse I report to the best of my knowledge, and will disclose omissions and give reasons for them.

## **I. Directive 79/7/EEC**

### **a) General scope of the Directive**

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

Coverage of Directive 78/7/EEC is restricted to statutory schemes. In modern German social security law, there are two categories of statutory schemes: one, the statutory schemes covering employed workers, and two, the statutory schemes covering public servants, whose work is a statutory obligation.

These two systems belong to different branches under the most common systematisation of social law in Germany, which is also mirrored in Article 74 *Grundgesetz* (German Constitution). This system categorises social law into the sub-categories of 'social insurance' (*Sozialversicherung*). 'Social maintenance' (*Sozialversorgung*) and 'social assistance' (*Sozialfürsorge*).<sup>18</sup> Social maintenance is funded from general public resources and granted to those who are considered to bring a specific sacrifice for the public. This category includes those on obligatory military service, victims of crimes (who bring a sacrifice in order to allow a workable system of crime prevention which is never perfect) and public servants, judges and soldiers (who bring the sacrifice of dedicating their life to serve a public cause). Old age income for public servants is regulated by the '*Beamtenversorgungsgesetz*', which most authors consider as covered by Directive 79/7/EEC. Health insurance is only partly covered by statute, which grant '*Beihilfe*' (literally: assistance) for most health risks, which leads to private insurance of most public servants for the proportion not covered by '*Beihilfe*' (normally 50 % for singles, 70 % for married persons with one dependent spouse and one or more children or for singles with two or more children, higher percentages apply for the children themselves in some states). This leads to higher health costs for women. Whether '*Beihilfe*' is covered by Directive 79/7/EEC is not clear. Accidents at work are covered by *Beamtenversorgungsgesetz* as well; and the same applies for occupational disease. Following the constitutional reform of federal competences, legislation on public servants is now being thoroughly reformed<sup>19</sup>, the future of social security for public servants is subject to review following this. Thus, the report abstains from reporting 17 different pieces of legislation in relation to each of the questions, and omits the situation of public servants in the following.

Social insurance is funded by contributions and subject to social self-administration, alongside statutory rules. Social insurance has traditionally only covered employed workers. However, following reforms from the 1980s, coverage has been extended continually to include some categories of self-employed workers. In addition, health and old-age insurance has always allowed voluntary membership, albeit on less favourable conditions than for employed workers.

#### - **Statutory sickness scheme**

Since the '*Gesundheitsreformgesetz*' (Health Reform Act) of 1988, the statutory health insurance for employed workers and some categories of the self employed is regulated in the fifth book of the Social Legislation Act (*Sozialgesetzbuch 5. Buch*).

Following a thorough reform of the health insurance system, there is now (from 1st of April) a general obligation for everybody to obtain health insurance, which is connected to an obligation of private insurers to offer one 'basic tariff' to everyone. The question, whether this has as a consequence that access to private insurance contracts might fall under Directive 79/7/EEC, has as yet not been discussed. If an obligatory insurance would have this consequence, the next question is whether private insurers continue to enjoy the 'discrimination privilege' under Directive 2004/113/EEC, which to date exempts them from the obligation to refrain from charging women higher health insurance premiums on grounds of their sex.

#### - **Old age insurance**

From October 2005, the various organisations providing old age pension under *Sozialgesetzbuch 6* have been merged into two organisations:

- *Deutsche Rentenversicherung* covers employed workers (blue and white collar)

<sup>18</sup> See Igl/Welti, *Sozialrecht*, 8. ed. 2007, § 2 no. 2.

<sup>19</sup> See draft '*Beamtenstatusgesetz*' (BT-Drs 16/4027, available from <http://dip.bundestag.de>).

- *Deutsche Rentenversicherung Knappschaft-Bahn-See* covers employed workers in mining, railroad and sea transport.

The relevance of the first pillar of the old age insurance is being reduced by strengthening the third pillar. The legislation through which this is affected is, however, focused on tax relief and thus not covered by Directive 79/7/EEC (see also p. 46 of national strategy report on old age pension systems)

- **Invalidity**  
Invalidity pensions are covered by the statutory framework on old age pensions (*Sozialgesetzbuch 6*), except when invalidity is due to occupational disease or accident
- **Occupational disease and accidents**  
These issues are regulated in *Sozialgesetzbuch 7*.
- **Unemployment and integration measures**  
Unemployment benefit is based on insurance in Germany and is consequently covered by Directive 79/7/EEC. It is regulated in Social Legislation Act III (*Socialgesetzbuch III*). Being insured against unemployment not only secures benefits, but also access to integration measures in kind. Most importantly, participation in training or re-training is dependent on the unemployed person receiving benefits.
- **Other**  
As said above, there are several groups of self employed persons included in the statutory insurance scheme. Partly, their rights are granted by specific statutes. In relation to these, it has never been discussed whether Directive 79/7/EEC applies.

2. *As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

Statistics on social security issues are notoriously difficult to obtain. The latest statistic available presently gives the numbers for December 2005, when Germany had 82,438,000 inhabitants altogether. In this year, the absolute numbers for the relevant branches are:

- Statutory sickness schemes:  
50,408,000 members (61.14 %) (note that this low proportion was the reason to introduce obligatory insurance for everyone, which will lead to higher coverage of the German populace in health insurance, albeit not necessarily within the statutory schemes)
- Old age and invalidity pension insurance<sup>20</sup>  
51,729,000 members (62.74 %)
- Occupational disease and accidents (numbers only for 2004)  
57,803,000 members (70.11 %)

3. *What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

As explained, the insurance system normally only covers employed persons, and their family members, as well as such unemployed persons who receive public benefits. Thus, the main reason to be excluded is to be unemployed, no longer entitled to benefits and not being a family member to an employed person.

Voluntary insurance obviously depends on the capacity of persons to pay. Thus, the main reason to be excluded here is not having sufficient means to cover insurance contributions. In addition, employed persons are only covered if they are not in 'minor employment' (§ 8, 8a SGB IV). Minor employment can be constituted by a minor income (400 euro or less) or by minor duration (less than 50 days a year). This construction has been considered as compatible with Directive 79/7/EEC by the ECJ (case Nolte C-317/93), although it impacts disproportionately on women.

<sup>20</sup> For this insurance branch, a variety of gender specific statistics are available, [http://forschung.deutsche-rentenversicherung.de/ForschPortalWeb/contentAction.do?statzrID=0B5C67BC9BA1A427C1256F110039120E&chstzr\\_Versicherte=WebPagesIIOP14&open&viewName=statzr\\_Versicherte#WebPagesIIOP14](http://forschung.deutsche-rentenversicherung.de/ForschPortalWeb/contentAction.do?statzrID=0B5C67BC9BA1A427C1256F110039120E&chstzr_Versicherte=WebPagesIIOP14&open&viewName=statzr_Versicherte#WebPagesIIOP14).

*4. In which areas and to what extent especially women are excluded from benefits, from access to the schemes or from more generous benefits?*

Access to schemes: the structural exclusion of women from employment and from resources is mirrored in the fact that their proportion among those insured is lower than that of men. The clause on minor employment impacts negatively on women. Benefits: pension benefits and unemployment benefits are income related. This means that women due to their lower income on average receive lower benefits. Unemployment benefit is also means tested after an initial phase. This means that married women disproportionately drop out of benefits and also the opportunity to profit from training and other outreach measures.

*6. How could this situation be amended?*

There are obviously two different ways to amend the detriments women suffer from the German social security system. On the one hand, equality in practice could be achieved in the employment market as well as in sharing burdens of raising children and delivering care for adults, on the one hand one could proceed on the assumption that in Germany women will continue to interrupt their careers for comparatively long periods in order to raise children and support their grown up husbands in their daily work. While the first possibility would be more effective in generating equality in practice in all fields, it is unlikely to happen. Obviously, upholding a lifestyle after the second alternative as a viable option for women will have a negative impact on the probability for equality in practice to develop forward: Those women who are not content with this model for their life will have to compete with men in the employment market who do not have to care for their own household dues. They will thus suffer a severe competitive disadvantage (as well as those men who deny having a personal unpaid housewife working for them). Accordingly, any Member State pursuing the second option will never achieve full equality in practice.

Having said this, it is also apparent that the social insurance and benefit system can only contribute (in limited ways) to equality in fact. An obvious measure to ameliorate the situation would be to introduce insurance for any income. Probably introducing insurance for employed and self-employed income alike would also contribute to better coverage of women. Including women who have become mothers into the schemes, irrespectively of whether they have worked before or not, until a given age of a child, would enhance their position as well. Child bearing still bars women from access to the labour market, and initially being able to benefit from integration measure via unemployment benefits might help. Obviously, all these measures are costly, and impact on the budget of insurers and the public budget.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Yes.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded. 3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

Germany has adapted old age pension ages for women and men.

As regards advantages for persons who have brought up children, there remains a small advantage in favour of women: There is a statutory assumption that the parent who brought up children is the mother. Parents can apply for having the relevant pension benefits allocated to the father, if he is the one who actually cared for the child. Due to the upper limit of benefits, this only makes sense in the – atypical – cases where the father instead of the mother stopped working or reduced working hours considerably. If the parents do not declare the opposite.

Entitlements for widow and widowers pensions will be equalised for women and men in 2015. This applies also for invalidity in relation to occupational accidents and diseases.

Cases of waiving pension rights are still possible, but the provisions are now gender neutral. In practice, more women than men would use these.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

I think that maintaining the advantage in relation to bringing up children mirrors actual responsibility which will not change in any foreseeable time. Thus, the provision should not be changed. All the other issues are equalised or will be equalised soon.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

As explained, all statutory pension schemes are related to pay. However, it is very well possible to distinguish between statutory and occupational pensions, as occupational pensions are based on a pension agreement (individual or collective).

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

This is a question which is only answered once the EC Commission requires it explicitly. Accordingly, the last time numbers were aggregated was in 2004 in order to prepare the national action plans for old age pensions. At this time, numbers for 2003 were available. These said that 57 % of all employed persons were expecting to benefit from occupational pensions, while only 29 % of employed women were expecting to benefit from occupational pensions.<sup>21</sup>

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Article 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

Most schemes are still using actuarial discrimination. As this has been legalised as an ongoing practice by the 'Allgemeine Gleichbehandlungsgesetz' (General Equal Treatment Act, see § 21), this will not change in the foreseeable future. Resulting differences in occupational pensions are normally evened out by higher contributions of employers in favour of women.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

Defined benefit schemes.

*5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of 'old' pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

Pension ages have been adjusted upwardly. The pension rates had been lowered from 75 % to 71 % before this. I don't see a relation to the gender aspect here, but rather to the general policy that all persons shall be induced to enter into 'third pillar contracts'.

## **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

As I have explained in the beginning, there is a special German connotation for the 'three pillars'. In this regard (distinguishing between insurance, maintenance and assistance), there has been a constant tendency to blur the distinction between insurance and maintenance. Especially in relation to old age pensions of public servants, judges and soldiers, it is difficult to justify placing these under 'maintenance'.

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<sup>21</sup> See [http://www.bmas.bund.de/BMAS/Redaktion/Pdf/Rente/rente-fragebogen-kommision\\_property=pdf,bereich=bmas,sprache=de,rwb=true.pdf](http://www.bmas.bund.de/BMAS/Redaktion/Pdf/Rente/rente-fragebogen-kommision_property=pdf,bereich=bmas,sprache=de,rwb=true.pdf), page 8.

The distinction between insurance and assistance are also blurred in relation to the risk of becoming unemployed. Although all employees pay insurance contributions to cover this risk, the insurance related payments have been reduced considerably.

Possibly, this question also relates to the three pillars of the pension system. Personally, I am not convinced that the strengthening of such pillars which cover for payments via the capital market is a sensible strategy. While these reservations are not gender related, first pillar pensions tend to be more favourable for women (at least in Germany), as there is no risk of insurance discrimination in this regards. Accordingly, strengthening the first pillar would be positive in terms of gender issues as well.

*2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

These different instruments offer different degrees of protection against discrimination against women. The protection offered by Directive 2004/113/EC is weakest, as insurance discrimination is widely legitimised by this instruments. This leads to ill defendable contradictions in the granting of pensions. I am not sure whether this can be amended, though, given the fierce opposition of the insurance industry from Germany and the UK against an obligation not to discriminate in the past. For strategic reasons, I would thus argue in favour of maintaining the distinction between the third pillar and the other pillars.

The protection offered by the second pillar is strongest, mainly as a consequence of ECJ case law on equal pay. As the ECJ has had a tendency to grant Member States wide discretion in favour of disadvantaging women in the field of social security proper, this would be another strategic argument for maintaining the differentiation between the first and the second pillar. If those two pillars would be merged, it is likely that the strict standards against gender discrimination within the second pillar would be lost.

As has become apparent, I made only strategic submissions here. On a principled basis, I am convinced that the prohibition to discriminate against women on grounds of their sex should be defended in all three fields. However, from a realistic perspective, success will be distributed unevenly. This is the reason for my argument of upholding the differences from a gender perspective.

From a general social security perspective, there would be some argument against strengthening such pillars under which old age pensions are under the risk of development of capital markets. This would lead to arguments in favour of strengthening the first pillar. However, this might not be realistic in a political sense.

#### **IV. Additional remarks**

From the fact that a questionnaire is provided I conclude that the Commission considers to propose new instruments in the field of social security. If that is the case, there would perhaps be an opportunity to adopt a wider definition of social security than that used in Directive 79/7/EC.

Social security should always develop along the lines of demand for security.

Within the global information and knowledge society, one could consider that there is a new risk of becoming under educated which should be included within the catalogue of social security measures. Fields covered would be offering early education (i.e. from before the normal school age) and also covering the risk of families not being able to pay for further education. Both fields are highly gender sensitive: early education, if offered on a reasonable basis, would reduce the risk of mothers to be forced out of employed work. Further education, if becoming ever more costly, is often granted in gender imbalanced ways as long as families of origin have to bear the largest part of the financing. Thus, establishing the risk of under-education as a new pillar within the social security system would be a positive development from a gender perspective.

Another issue would be the risk of being poor while in employed work. Many Member States have minimum wage legislation in place to fight this risk. Again, there are some gender aspects here, as women are more likely to profit from minimum wages. This is, however, only the case if the minimum wage is defined in absolute numbers. Present plans in Germany include the definition of minimum wages in relation to average earnings agreed upon under collective agreements. This would transport a large part of the gender pay gap into minimum wage legislation. Again, an issue for social legislation with positive gender impact.

Thirdly, the risk of becoming poor because of being an active parent is increasing and should be addressed by social security as well.

All three of these risks can be defined as employment related. Thus, it is probably worth the effort of including these into the scope of a new gender related instrument, if there is any perceivable opportunity to widen the notion of social security accordingly in general.

## GREECE

*Sophia Koukoulis-Spiliotopoulos*

### I. Directive 79/7/EEC

#### a) General scope of the Directive

1. The Greek social security system is fragmented, very complicated and not based on uniform principles.<sup>22</sup> There are more than 200 schemes, each one governed by its own provisions, which are scattered in several, often amended, statutes and administrative acts of general applicability (decrees or ministerial decisions) issued on the basis of enabling statutes. It is thus very difficult, if not impossible, to investigate them in order to find out which ones are statutory and which are occupational and whether they contain discriminatory provisions on grounds of sex. It is more generally very difficult to find one's way in this maze.

All compulsory social security schemes have to be run either by the State, directly, or by legal persons governed by public law, in accordance with Article 22(5) of the Greek Constitution which makes social security an obligation of the State.<sup>23</sup>

*Schemes which grant benefits that must be considered as being part of the first pillar targeted by Directive 79/7/EEC*

The main (compulsory) statutory social security scheme is the one run by the Organisation of Social Security (**IKA**) and governed by Act 1846/1951. It covers automatically, from the time they start work, workers under a private law contract of employment employed by different employers, provided that they are not covered by another compulsory scheme, regarding *sickness, invalidity, old age, accidents at work and occupational diseases*, as well as *maternity protection* [consisting of (i) a monthly allowance during maternity leave, which is equal to the sickness allowance and is supplemented by a monthly allowance paid by the OAED (*infra*), so that the woman receives her full pay, and ii) a confinement allowance, i.e. a lump sum for medical care and hospitalisation during confinement, which is also paid to the worker's wife, if she is not directly covered by another scheme]. It also covers *sickness of the members of the worker's family* and grants *survivors' benefits* in case of death of the worker.

A supplementary compulsory statutory scheme, run by the Unified Supplementary Social Security Organisation for salaried Workers (**ETEAM**), which was created by Article 6 of Act 3029/1992, grants supplementary old age and invalidity pensions as well as survivors' pensions to workers covered by IKA and their family.

Other examples of statutory schemes:

- the compulsory scheme run by the Organisation for Agricultural Social Security (**OGA**) (Acts 4169/1961, 2458/1997), which covers farmers who are not salaried workers and their family regarding the same risks as those covered by IKA;
- the compulsory scheme run by the Merchant Seamen's Fund (**NAT**) (Acts 4502/1966, 792/1978, 1085/1980), which covers workers in maritime employment regarding old age and invalidity pensions and survivors pensions for their family;
- the compulsory scheme run by the Seamen's Home (**Oikos Naftou**) (Decree 894/1981), which covers the same workers as the NAT regarding sickness and accidents at work which do not entitle to a pension.
- the scheme run by the Agency of Manpower Employment (**OAED**) (Acts 2961 and 1545/1985), which provides, *inter alia*, protection against unemployment regarding employment under a private law contract, which consists in vocational guidance and training, assistance to job seekers and unemployment allowances; this scheme also provides several other allowances, such as a maternity allowance that supplements the IKA maternity allowance (*supra*) and (not means tested, but very low) child allowances to workers who are covered by a compulsory social security scheme, provided that they don't receive such an allowance from their employer.

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<sup>22</sup> This was acknowledged by the Greek Report on Pension Strategy, 2002, and it is confirmed by the Greek National Report on Pension Strategy, 2006-2008.

<sup>23</sup> Council of State (Supreme Administrative Court) no. 5024/1987.



*Social assistance schemes which intend to supplement or replace the schemes referred to above, according to Article 3 (1) (b) of Directive 79/7/EEC*

- OGA grants a (means tested, very low) pension to persons over 65 years of age who are not covered by any social security scheme;
- the State (Ministry of Employment) grants a (means tested, of a rather sufficient amount) invalidity allowance to persons who are unfit for work and are not covered by any other scheme;
- the State grants a (means tested, very low) monthly maternity allowance to women who are not entitled to such an allowance from any other scheme (Decree 57/1973);
- the State grants a (means tested, very low) 'unprotected child allowance' (Act 4051/1960 and subsequent Decrees) for children under 16 whose parents are dead or unable to maintain them; the recipient is the family with whom the child lives.

2. It is impossible to find the percentage of the population covered by schemes that fall within the scope of Directive 79/7, as the distinction between statutory and occupational schemes within the meaning of EC law is virtually unknown in Greece, and moreover, the Greek State refuses to acknowledge that there are quite a lot of occupational schemes (see *infra*). It seems that the bulk of the working population falling within the scope of Directive 79/7 is covered by the schemes of IKA and OGA.

3. The main reason to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC is that they work in non-remunerated jobs, with the exception of unpaid family workers (i.e. those whose main profession, even part-time, is to work for their spouses or for up to 2nd grade relatives)<sup>24</sup>; these workers, who are mainly women, are covered by IKA for sickness and maternity benefits (Article 1 and 2 of Act 1846/1951), provided that they are not affiliated with another scheme. Otherwise, even those who work for pay very few weekly hours or for a too short period are covered by social security proportionately to the hours or period of employment.

4. Women are *excluded from benefits*, in some cases where these are granted only to men; e.g. - IKA grants a *pension increase* to men for a dependent wife, but not to women for a dependent husband. The relevant provision (Article 29(3) of Act 1846/1951) was not amended, in spite of the Council of State having ruled long ago that it is contrary to the constitutional gender equality principle (Article 4(2) Const.) and that women are also entitled to this increase subject to the same conditions as men.<sup>25</sup> - OGA grants a *family allowance* for a dependent wife, not for a dependent husband (Article 5(1) of Act 4169/1961, as amended). The Council of State does not seem to have dealt with this discrimination. Provisions like the above, which are remnants of the 'male bread winner' stereotype, cannot be justified anymore under Article 7(1), in conjunction with Article 8(3) of Directive 79/7 (*infra* b(2)).

Access to the IKA scheme may be delayed or even not achieved regarding *unpaid family workers*, who are mainly women (*supra* no. 22), as their coverage starts and ends on the day on which the worker him/herself or the person who receive his/her services notifies in writing the IKA of the commencement and/or the end of the employment, provided that the competent IKA organs ascertain that employment has really started or ended. In practice, family workers are mostly undeclared. According to well-established Council of State case law, the notification in writing is a strict formality, failing which the worker is not entitled to coverage by the IKA, even if it is proven that he/she is actually working, and the contributions eventually paid to IKA are ineffective.<sup>26</sup> This is an exception to the general rule that coverage by IKA starts automatically on the day on which the worker starts work, irrespective of notification. According to this general rule, in case the employment is not notified by the employer, the worker can file a complaint with IKA at any time, even after termination of the employment, and if IKA ascertains the employment, he/she is retroactively covered (the retroactivity can go back to a *maximum* of 10 years). This constitutes indirect discrimination against women, which is contrary to Directive 79/7 and to Articles 6 and 7 of Directive 86/613 (helping spouses).

The same problem as above exists regarding *domestic workers*, women in their great majority, whose coverage by IKA depends on when IKA is informed of their employment.

6. *How could this situation be amended?* The Commission should send a letter of warning and, if the above discriminatory provisions are not modified or repealed, it should issue a reasoned opinion and have recourse to the ECJ in case of non compliance.

<sup>24</sup> i.e. children, parents, brothers, sisters, grandparents, grandchildren.

<sup>25</sup> Council of State nos. 4117/1983 and 1261/1994.

<sup>26</sup> Council of State nos. 946/2005, 1868/2004, 730/2003, 462/2003.

## **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. As the distinction between statutory and occupational schemes is virtually unknown in Greece, the Council of State, which deals with social security cases regarding schemes that have to be considered as statutory under EC law, relies solely on the gender equality constitutional rule (Article 4(2) Const.) in order to declare the discriminatory provisions invalid and to annul administrative acts which rely on such discriminatory provisions.

*Article 3 (2) of Directive 79/7* provides that family benefits and survivors' benefits do not fall within the scope of the Directive. Article 28(6) of Act 1846 (IKA) requires additional conditions for *widowers* to be entitled to a surviving spouse's pension, as compared to the conditions applying to widows. The Council of State has held that the additional conditions create discrimination contrary to the constitutional gender equality rule (Article 4(2) Const.) and that *widowers were entitled to the pension* subject to the conditions applying to widows.<sup>27</sup> In spite of this case law, the discriminatory provisions have not been repealed or amended.

2. There is no general exclusion of gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in *Article 7 (1) of Directive 79/7/EEC* – and there cannot be such a general exclusion, as it would run contrary to the constitutional gender equality rule (Article 4(2) Const.). Moreover, the Greek State can invoke no justification anymore, under Article 7(1), in conjunction with Article 8(3) of Directive 79/7, for maintaining such discriminatory provisions, in particular where the Council of State has considered them unconstitutional, the more so as most Council of State judgments in such cases are based on the evolution of social conditions. Examples:

- i) *Pension increases for a dependent wife (IKA)*: the Council of State has long ago ruled that they are unconstitutional, hence invalid, but the provisions were not amended (*supra* a(23));
- ii) The granting of a *family allowance* for a dependent wife, not for a dependent husband (OGA), which has not been dealt with by the Council of State (*supra* a(4)), must also be considered unjustified on the same grounds, and the allowance must be granted for dependent husbands as well;
- iii) *Earlier old age pension for women who are divorced or widows and have minor children (IKA)* (after a shorter period of employment and at a lower age than men) (Article 28(5) of Act 1846/1951). The Council of State has ruled that men are also entitled to this earlier pension subject to the conditions applying to women,<sup>28</sup> but the provisions have not been amended;
- iv) There are also provisions in statutory schemes which grant an *earlier old age pension* to women, irrespective of whether they fulfil conditions like the above. Such provisions were maintained by Article 2 of Act 3029/2002, regarding, *inter alia*, IKA;
- v) A *service/pension credit* is provided by Article 4(7) of Act 3029/2002 for persons insured with IKA: women can be credited with 1 year for the first child, 1,5 year for the second child and 2 years for the third child. If the mother does not make use of this credit, then the father, provided he is also insured with IKA, may make use of it. This measure was introduced as part of the 2002 Pension Strategy.<sup>29</sup> It is, however, obvious that it is not effective for tackling the real problems at the proper time. As the Court underlined in *Griesmar*, such a measure 'does not appear to be of a nature such as to offset the disadvantages to which the careers of [women] are exposed by helping those women conduct their professional life on an equal footing with men'. 'On the contrary, that measure is limited to granting [...] mothers a service credit at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career'. 'It is significant in this regard that, although [this] measure dates back to 1924, it has, to this day, still not been possible to resolve, by means of that provision, the problems which [a woman] may encounter in her career' (§§ 65, 66 of the judgement). It is true that in *Griesmar* the credit was available only to women, but the reasoning of the Court applies even in cases where men may also benefit therefrom, since it is the effectiveness of the measure that the Court does not recognise. Such credits, even if they are available to men as well, are in fact addressed to women who have managed, in spite of the adverse conditions that the 2002 Report on Pension Strategy acknowledges, to stay in or re-enter the labour market and for the many women who have not been able to realise this achievement it comes too late.

<sup>27</sup> Council of State nos. 2435/1997, 243/2000, 940/2001, 760/2001, Council of State Plenum 1467/2004.

<sup>28</sup> Council of State no. 139/1998.

<sup>29</sup> See footnote 20.

3. As mentioned above (1 and 2), women are treated differently from men regarding *survivor benefits*, *family benefits* and *pension age*.

4. In my opinion, the exclusions regarding *widowers pensions*, *pension increases* and *family allowances* granted only to men for a dependent wife, as well as *earlier pension for divorced women or widows who have minor children* (*supra* 20 and 1) should be extended to men, for reasons of family and childhood protection. The Greek Constitution requires family and childhood protection (Article 21(1) Const.), but there is also in EC law a general principle requiring such protection, which is acknowledged by ECJ case law (see more recently ECJ 27 June 2006, *Parliament v. Council*, C-540/03, nyr).

However, pension age, more generally, is a very hot issue in Greece, and raising women's pension age will have a high political cost. This is why it is avoided by all governments, even regarding occupational schemes, as we will see below. Moreover, the most important statutory schemes, such as IKA, OGA and NAT, cover many manual workers, while occupational schemes are more likely to cover many white collar workers, as we will see below. An argument in favour of equalizing pension ages would be that female manual workers do not have to be affected. It would thus be advisable to leave aside, for the time being, pension ages in statutory schemes, until the – equally hot issue – of pension age differences in occupational schemes is solved.

## II. Directive 86/378/EEC as amended by Directive 96/97/EC

1. It is not easy to distinguish between statutory and occupational schemes, the more so as the Greek State, under any government, systematically refuses to recognise that there are quite a lot of occupational schemes. This negative attitude of the Greek State was expressed in the *Evrenopoulos* case (C-147/95 [1997] ECR I-2057) and the *Commission v. Greece* case (C-457/98 [2000] ECR I-11481), as well as more recently, when the Commission sent a reasoned opinion, in July 2006, setting a period of two months for taking measures to abolish sex discrimination in occupational schemes and nothing was done. However, both above judgments made quite clear the criteria for distinguishing occupational schemes. According to these criteria, there is a considerable number of occupational schemes in Greece, including the Code of Civil and Military Pensions (Decree 166/2000) and banks or public corporations schemes.

After the ECJ found that Greece had failed to fulfil its obligations under Directive 96/97 (*Commission v. Greece*, mentioned above), Decree 87/2002 was adopted which purported to implement this directive. However, this decree just copied out the Directive, without specifying which Greek schemes are occupational or providing for any criteria on the basis of which such schemes could be identified. Thus, the distinction between statutory and occupational schemes, and even that decree, is unknown to lawyers, judges and workers or their unions. The decree has never been invoked before or applied by the courts. It is thus a meaningless piece of legislation and does not constitute adequate transposition of the directives.

It is generally considered that the only occupational schemes existing in Greece are those run by the so-called 'occupational social security organisations', whose establishment is provided by Article 7 of Act 3029/2002. These are non-profit legal persons governed by private law, which may grant supplementary social security coverage for any risk, on a voluntary basis, to workers employed by a certain undertaking or belonging to one or more professional sectors, to persons exercising a liberal profession or to the self employed. Article 7 prohibits any discrimination against persons entitled to participate in these schemes. Such a prohibition stems, in any event from Article 4(2) of the Greek Constitution.

Gender discriminatory provisions relating to occupational schemes were not repealed or amended, as the Court requires it in order to consider that the implementation of a directive is adequate. On the contrary, shortly after the issuance of Decree 87/2002 which aimed to transpose Directive 96/97, Act 3029/2002, which amended the Code of Civil and Military Pensions and several other occupational schemes covering the personnel of public corporations and banks, maintained discriminatory provisions, mainly relating to pension ages, or even introduced new pension age differences according to sex. This is why the Commission has sent a reasoned opinion last July, as mentioned above.

2. For the reasons stated above (a(2)) it is impossible to find the percentage of men and women who are covered by occupational pension schemes.

3. There are no actuarial factors in Greek occupational schemes.

4. Greek schemes are a mixture of defined-benefit and defined-contribution-schemes.

5. No measures have been taken until now in order to equalize pension ages in civil servants schemes. This is why the Commission sent a reasoned opinion to the Greek government, as mentioned above.

### III. The three pillar system as a whole

1. For Greece, the three pillar system is rather confusing and does not help in describing the different schemes, the more so as Article 4(2) of the Greek Constitution, which requires equality of rights and obligations for men and women in all areas, including social security of any kind, covers all schemes without distinction, and Greek courts make no distinction between schemes, so that the EC distinction seems artificial.

2. The exclusions and temporary exceptions allowed by Directive 79/7 (Articles 3(2) and 7(1) perpetuate the 'male bread winner' stereotype; thus, they don't seem to be particularly conducive to gender equality. However, particularly regarding *pension ages*, the distinction between first pillar (statutory schemes – Directive 79/90) and second pillar (occupational schemes – Directive 86/378 as amended by Directive 96/97) seems useful, at least for the time being, as we have mentioned above(1(b)(4)). As there is a strong reaction against raising women's pension age by all political parties, trade unions and several women's NGOs and as no government dares to proceed with it, for fear of the political cost, equalisation of pension ages should be gradually introduced, without acquired rights of women already in employment being affected.

As I have written in the 'Analysis of the gender dimension in the pension reports of 2006', there is nothing on gender equality in the Greek Pensions Report, although in the 'Annex to the Joint Report on Social Protection and Social Exclusion 2006 – Country Profiles'<sup>30</sup> '*gradually equalising the legal retirement age for men and women*' is recommended for Greece. As I have also written in that Analysis, there seems to be a tendency in the EU to raise retirement ages; however, we cannot be sure that this is the best solution, in particular in view of the urgent need to reduce youth unemployment. Let us recall the following relevant passages of the Conclusions of the 2006 Spring European Council:

*"With a view to making it more attractive for older workers to stay employed for longer, the European Council **underlines that active ageing strategies** should be implemented. In this context, incentives for prolonging working lives, gradual retirement, part-time work, improving quality at work and targeted incentives to ensure that the number of older workers participating in training rises faster than that for the overall workforce should be considered."*<sup>31</sup>

Such strategies can bring solutions to hot issues, like the pension age one, which will be acceptable to people. Instead of panicking or creating panic, as they currently are, Greek authorities and concerned stakeholders should start discussion on such solutions the soonest possible. Relevant guidance from the Commission is more than necessary and very urgent.

We cannot as yet evaluate the impact of *Directive 2004/113* (third pillar and private insurances), the more so as in Greece no measure has been up to now taken in order to implement it. However, the *actuarial factors*, which this directive allows, seem a hindrance to gender equality. They open up a dangerous breach in gender equality and they may operate as precedents for other derogations from this principle. If pension ages are equalised (even gradually), there will be no justification anymore for retaining these factors. Moreover, they will be less and less justified by the differences in life expectation between men and women, which tend to diminish more and more.

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<sup>30</sup> Council of the EU, 6800/06 ADD 1, 28 February 2006 (en), & 7294/06 ADD 1 (el), 13 March 2006 (20.03).

<sup>31</sup> Brussels European Council 23-24 March 2006, Presidency Conclusions, § 39 (emphasis added).

## HUNGARY

Csilla Kollonay Lehoczky

### **a) General scope of the Directive**

*1. Description of sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-schemes constituting the first pillar targeted by Directive 79/7/EEC and social assistance schemes to supplement or replace the referred schemes under Article 3 (1) (b) of Directive 79/7/EEC.*

The comprehensive Hungarian social insurance system covers each risks belonging to the first pillar targeted by Directive 79/7. The system is regulated by a set of four, interrelated Acts of the Parliament.<sup>32</sup> The basic legal framework of the whole system is laid down by Act LXXX of 1997 'on the personal scope of entitlements to social insurance benefits and private pensions as well as on the financial funds covering these benefits', establishing two branches of social security: pension and sickness insurance. Social security pensions – old age pensions, disability pensions (as well as survivor pensions albeit not required by Directive 79/7) are regulated by Act LXXXI of 1997 on social security pensions. The mandatory private pension schemes (and the operation of the private pension funds) are regulated by Act LXXXII of 1997 on private pensions and private pension funds. Sickness insurance is regulated by Act LXXXIII of 1997 on mandatory health insurance covering both in-kind medical services as well as the compensation for lost income. Work-related accidents and occupational disease do not create a separate branch of social security; pensions related to occupational reason are regulated in the act on social security pensions, whereas temporary incapacity to work due to work-related reason is regulated in the act on health insurance.

Social assistance schemes are established<sup>33</sup> to provide replacement or supplement for those, who, for any reason, failed to qualify for the benefits or for adequate benefits (in terms of amount or length of payment) within the overall social insurance system. Old age allowance is a means-tested benefit for those who are beyond pension age and their income is around minimal pension (80 % average with a spouse or partner, 95 % in the case of a single person below 75 years of age and 130 % in the case of a single person above 75 years of age). In such cases the income is supplemented up to the percentages mentioned here. A means-tested cash assistance, the so called 'regular social aid' may be paid to the disabled persons who could not qualify to disability pension either because they have never been able to work, or, who lost their working capacity to the extent (67 %) that would qualify them to disability pension but they are not qualified in lack of the required service period. The assistance, based on a rigorous means-test (applying not only family unit-income-test<sup>34</sup> but also property-test) may supplement the family-unit income up to the 90 % of the minimal pension and they do not have property.

The disabled can draw further two kinds of supplementary income. First, they are entitled to so called 'disability allowance', a very low, lump-sum cash benefit without means test to the seriously disabled.<sup>35</sup> Second, within the rehabilitation schemes persons can be qualified to income-supplement up to the amount of their previous income for the period of training (re-training) undertaken, and for unlimited period if the loss of working capacity has been caused by occupational disease or injury.

*2. Percentage of the population covered by these schemes, differentiating along the different sectors of benefits covered).*

The regulation on social security defines the concept of the 'insured' in a very broad way, covering practically everyone who has income from work, regardless to the title of the contract or the relationship, that is employees, self-employed, individual and joint entrepreneurs, co-operative members, agricultural workers and also so called helping family members are covered. Nonetheless the broadening personal scope under the law, the real number of registered insured has permanently decreased during the transition. While the number of the insured was 5.1 million, that is, 49.6 % of the population in 1990, this has shrunk to about 3.8 million, i.e. to 38.5 % of the total population by 2005.

4.25 million workers were reported for pension insurance (including those in maternity leave etc.) in 2005, that is 84 % of the total population of 5.07 million above 15 years of age without the pensioners and full time students. The people reported for insurance are also covered by health insurance; on the other hand, the number of those taking the services of health insurance is much higher, in a good part due to the estimated large number of so called 'free riders', who, due to the inaccurate records can take services without paying contributions (the authorities try to create a transparent and reliable record in these days).

<sup>32</sup> Acts no. LXXX, LXXXI, LXXXII and LXXXIII of 1997, entering into force from January 1, 1998.

<sup>33</sup> Act III of 1993 on social assistance and the administration of social assistance.

<sup>34</sup> The computed 'family unit' is less than the number of persons living in the family.

<sup>35</sup> Act XXVI of 1998 on the rights of the disabled and on the guarantees of the equality of their opportunities.

The number of those, right now drawing pension was 2.75 million and, together with those roughly quarter of million persons drawing 'pension like' social income (kinds of disability allowance) was 3.03 million in 2006 that is 30 % of the total population of out of the roughly 10 million total population. The number of the old-age pensioners is 1.66 million. The number of those receiving disability pension is considered fairly high, 0.81 million, i.e. over 8 % of the total population, and whose major part (over 60 %) are below pension age. This also means that out of a population of 2.15 million above 60, roughly 2 million receive old age or disability pension (at the same time this would not mean that these persons do not have salary or other income). The percentage of the population drawing means tested old-age assistance is less than 1 %, the two kinds of disability benefit are paid to around 23-24 % of the total population.

Concrete statistical data on the beneficiaries is difficult in part because of the mixed date and also due to the existence of the informal economy. Furthermore the data are providing cross-information, the borderlines between statistical age groups are not corresponding to the current pension age limits. With respect to health insurance, the health- and sickness insurance are not separated, thus, care, the number of insured is broader than those employed (insurance is possible through individual agreement, furthermore there are categories like children, homeless, persons on maternity leave, who are covered by the force of the law without paying contribution, and last but not least, there are many who are qualified as 'employees' (one hour per week is qualifying as 'worker'), however, are not insured.

For 2004 the number of persons contributing to health insurance was 3,879 against the total population of 10,117 million and in 2005 the health insurance payers were 3,881 against 10,097. There are data that those taking use of health insurance is at least half a million more, however, in lack of exact data the National Health Insurance Fund makes only estimations of those using health insurance now.

### *3. Main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC.*

The broad coverage of the 'insured' does not exclude any group of the society. In the past the social security status of certain self-employed, that is the 'primary agricultural producer' (who produce and sell agricultural products on the market at low scale) or part timers with very low number were excluded. The 'primary agricultural producers' in the past were permitted not to join the insurance if their income remained under a certain amount and they opted for this opportunity. From 2007 they have to join the general social security scheme. In spite of the fact, that their conditions for contribution are more favourable in comparison to the general rules, they perceive the change as a setback of their situation, because of the contribution they have to pay. In case of part time employment there is no lower limit of the working hours regarding access to social security. In the case of non-employment forms of work (self-employment, contract-work etc.) the lower limit of coverage is to earn at least thirty per cent of the national minimum wage, independently from the number of hours worked. In case of non-qualifying for social security by the amount of paid-work, any person may become insured by a contract concluded with the social security organ.

### *4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

Under the social security regulations in force women are not excluded from any and in any way from social security benefits and their access to schemes is entirely equal with men. In order to guarantee full equal treatment by accommodating childcare duties the periods of interrupting work for the purpose of childcare (by any of the parents) are all added to the length of service period of the parent taking such a leave. Correspondingly, contribution to be paid by employees to the pension fund is deducted from the benefit, whereas the employers' contribution is covered by the social security fund or public office disbursing the parental benefit. Nevertheless there remains a difference in the working career (length of service and earnings) the average pensions of women are lower than those of men.

### *6. How could this situation be amended?*

There is no need to change the legal norms. The *de facto* situation needs change with respect to the distribution of family chores and sharing of child-raising. This could be achieved among others by the full implementation of Directive 96/34/EC in the sense of giving not only free option for the parents but – at least in part non-transferable – individual right to parental leave, that could contribute to the change of the deeply engraved stereotypes. Furthermore incentives to parents during parental leave – that are, in part, unfortunately withdrawn from 2007 – could also promote the change of the situation.

## **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Introduction of the principle of gender equality with respect to family benefits and survivors' benefits in spite of the possibility provided by Article 3 (2) of the Directive.*

Hungary has introduced the principle of gender equality in relation to family benefits and survivors' benefits already before joining the European Union. The access of women and men to the widow's or widower's pension is equal. Similarly, the entitlement of orphans to orphans' pension is without regard to the sex of the deceased parent.

There is no difference between men and women with respect to the access to family benefits, either regarding the right to take the leave of absence for childcare (or other family-care) purposes, or regarding cash-allowance for such periods, as well as maintaining health insurance membership and obtaining credits towards pension benefit entitlements during such interruptions. Furthermore, there is no difference in the entitlement to family allowance that is paid to the parent who, upon decision of the parents, submits the claim for the benefit.

*2. Gender equality in relation to benefits, pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC?*

The regulation has not maintained any difference mentioned in Article 7 (1) of Directive 79/7/EEC between sexes. Retirement ages have been gradually harmonized since 1998 and from 2009 it will be 62 for both sexes. The earlier difference in pensionable age has left over two minor differences, but both are going to be eliminated with the progress of time. First, the years spent in hazardous or arduous job entitling to lower retirement age (and thus lower number of service years) by one-two years for women (this issue will be re-regulated from 2011). Second, the right to take early pension will be then two years before pension age for both sexes (now it is more for women), this benefit will be gradually eliminated.

Advantages in respect of old-age pension (child credits to make up 1 to 3 missing service years in case of requesting early pension) are available for any insured who has given birth to a child and/or who raised children for at least ten years (originally fathers were entitled only if they raised children as single parent, however, the Constitutional Court invalidated the provision and obliged the Parliament to equalize these rights).

*3. Domains where women are treated differently from men (family benefits, survivor benefits etc.).*

There is none.

*4. The need to repeal exclusions from equal treatment.*

In lack of exclusions the question is not relevant.

## **II. DIRECTIVE 86/378/EEC AS AMENDED BY DIRECTIVE 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

In Hungary the statutory system is based on work relationship. There is no pension available unrelated to pay or to work-relationship (called 'social pension' in some jurisdictions). On the other hand Hungary has no occupational pension schemes in the meaning of being a second pillar as targeted by Directive 86/378/EEC.

The pension system has two first pillars, or rather two tiers of the first pillar. A statutory, national social security plan under the PAYG system and a mandatory private pension scheme on the basis of capitalization of the paid contributions, where the pension funds are formally constituted as savings associations whose members are co-owners of the fund. Neither of these can be assimilated to the occupational schemes under Directive 86/378/EEC. The difference between the two tiers is that whereas the social security PAYG system is mandatory for everyone, and the private tier is mandatory for only those who entered the labour market after 1 January 1998 (i.e. were not yet a part of the social security system before).

Historically there has been a special pension system by the law for railway workers, for miners and for members of armed bodies that might remind – by their separation along occupational line – to an occupational pension scheme. The special regulation – together with their special health insurance – has been adopted with regard to the special risks involved in these occupations that cannot be adequately addressed in the general national system. Nevertheless, they are a part of the 'first pillar' of the national pension system and are not considered by any source or authority (official or academic) as 'occupational' pensions.

Their statutory framework and regulations (contribution, entitlements) are similar to the general social security schemes, they are in the PAYG-system, as a special part of the first pillar.

The voluntary mutual insurance funds can also be partially considered as similar to the occupational funds, however, they are much more similar to the 'third pillars'. These are based entirely on individual accounts, they are individual forms of savings, and cover health insurance as well as accident, or assistance in case of individual hardships. They can never become a replacement of the statutory system. The employer may or may not be a member of the fund.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

The 'second pillar' not existing. – thus, there are no such estimations. The second 'tier' covers about 2 million people, that is, The men/women ratio in the second tier of the first pillar under the Hungarian system is not different from the first tier, i.e. the statutory PAYG system, considering that both are work related and both are mandatory for the working population.

*3. Actuarial factors used in this pillar regarding the equality of contributions for men and women and regarding the equality of the benefits paid to men and women.*

The second pillar is a capitalizing (fully-funded), defined contribution system. Thus, even if it is not an occupational fund, actuarial factors have a significance that causes uncertainties now, and will be most relevant from 2013 when the first private-pensions will mature and the annuity to be paid has to be defined.

At the time of the retirement the member of the private pension fund may draw an annuity (or, in case of less than 180 months of accumulation may get a lump-sum payment on the basis of the accrued contributions). The annuity can be paid by the pension fund itself or they may buy an annuity through from another insurance company. This transitory period (the first pensions will mature by 2013) is involving strong uncertainties, affecting strongly the calculation of annuities, especially in comparison to the formerly general and uniform PAYG system where both contributions and the benefit were defined by the laws. Therefore the pension funds are likely to opt for buying an annuity from an insurance company.

Regardless to the used method, both the pension fund and the insurance company are obliged by the law to use unisex life-expectancy tables for the actuarial calculations, however, there is reluctance to use the unisex life length tables and they also lack skill in calculating such annuities. Since no annuity has yet been paid, the emerging questions had not to be clearly answered yet.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

The first pillar is a PAYG system, defining both the contributions and the benefits, in the percentage of the basic income. The second tier of this pillar is a defined contribution system, where the real value of the account of the worker at the time of retirement will strongly depend on the gains (or losses) of the invested securities.

*5. Equalization of retirement age and pension rights with retroactive effects.*

With regard to the relatively early start of the equalization of pension age and pension rights the issue has not emerged.

### **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

Considering the wide variety of the composition of 'pillars' that might be composed of social pension (non-related to wages and employment), statutory (mandatory) public insurance based, statutory (mandatory) private insurance, occupational insurance (mandatory or optional), the pillar system appears meaningless. However, in order to establish a possibly just and flexible pension schemes the composition of a system from 'pillars' or/and 'tiers' is important, in order to express both social solidarity and be responsive to the individual needs.

The security provided by the pension systems might be more balanced and stronger in case of some harmonization of the existing 'pillars', especially the first ones – whether a social, non-employment related one would be available for everyone, or the first already shall be a work-wage related insurance benefit.



This might be in correspondence with proposals regarding the separation of social security from the labour market position of EU citizens.<sup>36</sup> The more flexible variety of pension schemes together with a soft harmonization might be a promoter of the greater work of those affected by the systems through either business forms (as members of funds) or through trade unions and collective bargaining. Although such far reaching or optimistic proposals might appear over-stated, the necessity of a multiple-pillar system seems obvious.

## *2. The impact of the pillar based approach to gender equality.*

The situation in Hungary has double face: on the one hand the legal norms provide a safe environment for gender equality. The Act on Equal Treatment and Equal Opportunity has extended the principle of equal treatment to services already before the adoption of Directive 86/378/EEC.

On the other hand a lot of uncertainty and potential risk might be created by the fact that Hungary is right now in a transitional stage regarding social security. The transformation of the pension system has been carried out, however, the real 'test' of the operation is still lying ahead. There are serious signs of warning both with respect to the 'relationship' between the two systems (serious deficits in the funding of the first tier due to the transfer of their contribution to the second tier<sup>37</sup> and serious uncertainties regarding the management and operation of the private funds. The whole health insurance system is right now under and before serious steps of reconstruction.

Lack of information is conspicuous; formally fund-members and even competent officials are in lack of information. Under the current conditions there might be a danger that weaker, non knowledgeable persons, with low bargaining capacities will be the losers of the uncertainties and these might be women in majority. There will be certainly a wrestling between principles of solidarity, social justice including sex-equality and business principles. Any forecast from the current Hungarian situation is difficult, with regard to the possibility of multiple paths from the current uncertainties.

## **ICELAND**

*Herdís Thorgeirsdóttir*

### **I. Directive 79/7/EEC**

#### **a) General scope of the Directive**

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)?*

The Icelandic Pension System is based on three pillars. A tax financed public pension scheme, which provides a flat-rate or means tested basic pension, a mandatory funded occupational pension scheme but publicly regulated (the pension funds) and a third pillar of voluntary private pension savings, which offers incentives in the form of complementary contributions from employers.<sup>38</sup> Directive 79/7/EEC is in annex XVIII to the EEA treaty. The first pillar targeted by Directive 79/7/EEC overlaps with the second pillar targeted by Directive 86/378/EEC as regards pension payments because traditional first pillar pension payments diminish if pensioner receives simultaneously benefits from occupational pension schemes, which are statutory in Iceland (the Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds No.129/1997).<sup>39</sup>

The social security scheme in Iceland is a resident based scheme covering the whole population. In addition to that there is the occupational pension scheme, financed by contributors which are both employees and employers. The whole working population must pay contributions to an occupational pension fund according to the Pension Act and receives pension payments from this pension fund and are only entitled to additional payments from social security if their pension payments from occupational funds are below a certain level. It may hence be relevant to speak of the social security system as being *de facto* second pillar.

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<sup>36</sup> See already in the so called *Supiot-report*, in 2000.

<sup>37</sup> A serious problem is for example that the 0.5 % of their salary is not enough to cover the remaining obligations of the fund (disability pensions). There are yet uncertainties about the survivors' pension rights under the new system.

<sup>38</sup> The total assets of Icelandic pension funds have grown over the past decade to over 120 per cent relative to the country's GDP. With Iceland's strong position in pension funding, contributions to pension funds are not expected to change over the next decades, despite changes in the age distribution of the population (source: Iceland Chamber of Commerce 2007: Iceland's Advance - Foreign Investment 2001-2006).

<sup>39</sup> The Pension Act, no. 129/1997.

According to Article 5 of Regulation no. 1408/71<sup>40</sup> on the application of social security rules in the case of workers and their families member states submit lists over the statutory schemes which provide protection against the risks mentioned in Article 3 (1) a in Directive 79/7/EEC. Iceland has submitted this list and the statutory schemes covered by Regulation no. 1408/71 according to this list are:

- (a) Benefits because of sickness, maternity and birth:  
*Social Security Act no. 117/1993*  
*Act on Healthcare no. 97/1990*  
*Act on Service and Recovery Institute for People with Visual Impairments no. 18/1994*  
*Act on the Affairs of the elderly no. 125/1999*  
*The Medicinal Products Act no. 93/1994*  
*Act on Maternity/Paternity Leave and Parental Leave no. 95/2000*
  - (b) Benefits because of invalidation:  
*Social Security Act no. 117/1993*  
*Act on the Affairs of the Handicapped no. 59/1992*  
*The Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds no.129/1997*  
*The General Pension Fund Act no. 155/1998*  
*The Government Employees Pension Fund Act no. 1/1997*  
*The Farmers' Pension Fund Act no. 12/1990*  
*The Seamen Pension Fund Act no. 45/1999*  
*Nurses' Pension Fund Act no. 2/1997*  
*Law on the Pension of the President of Iceland, Cabinet Ministers, Members of Parliament and Supreme Court Justices no. 141/2003*
  - (c) Benefits due to old age  
*Social Security Act no. 117/1993*  
*Pension Act for the Elderly no. 113/1994*  
*Act on the Affairs of the Elderly no. 125/1999*  
*The Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds no.129/1997*  
*The General Pension Fund Act no. 155/1998*  
*The Government Employees Pension Fund Act no. 1/1997*  
*The Farmers' Pension Fund Act no. 12/1990*  
*The Seamen Pension Fund Act no. 45/1999*  
*Nurses' Pension Fund Act no. 2/1997*  
*Law on the Pension of the President of Iceland, Cabinet Ministers, Members of Parliament and Supreme Court Justices no. 141/2003*
  - (d) Benefits because of accidents at work and occupational diseases  
*Social Security Act no. 117/1993*  
*The Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds no.129/1997*  
*The General Pension Fund Act no. 155/1998*  
*The Government Employees Pension Fund Act no. 1/1997*  
*The Farmers' Pension Fund Act no. 12/1990*  
*Nurses' Pension Fund Act no. 2/1997*  
*Law on the Pension of the President of Iceland, Cabinet Ministers, Members of Parliament and Supreme Court Justices no. 141/2003*
  - (e) Death grants
  - (f) Employment benefits  
*Law on unemployment insurance no. 54/2006*  
*Law on Insurance Fund for the self-employed no. 46/1997*
- If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.
- The EEA agreement, Regulation No. 1408/71, does not cover social assistance schemes, only statutory social security.

<sup>40</sup> 2 June, 2005, EEA supplement to the Official Journal no. 28/7.

2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?

The whole population in Iceland is covered by the national social security scheme. The whole working population is covered by the Pension Act Fund no. 129/1997.

3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?

The tax financed public pension scheme is means tested. Individuals with current incomes from other sources, including occupational funds surpassing a certain level receive less. Calculation of benefits takes into account payments from other sources which weigh differently according to a prescribed formula.

4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?

Women are not excluded from access to the schemes as no one may be refused membership of a pension fund for reasons of health, age, marital status, family size or gender.<sup>41</sup> The occupational schemes include widows' and widowers' benefits which the national social security scheme has abolished. Survivors pension are defined in the Pension Act.

6. How could this situation be amended?

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?

With regard to family benefits there is no gender discrimination if the prescribed conditions are met.

2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.

There are no derived benefits. The determination of pensionable age is the same for both sexes.

3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?

Women who have been homeworkers; single mothers or part time workers are evidently not receiving the same amounts from occupational pension funds as men. Women have in general 16 percent lower salaries and those who have never been active on the labour market are not in an enviable position as they get older.

4. Should these exclusions in your opinion be repealed? Please specify, which and why.

#### **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?

Yes. The Icelandic Pension System is based on three pillars. A tax financed public pension scheme, which is means tested, mandatory funded occupational pension schemes (the pension funds) and a third pillar of voluntary private pension savings. Approximately 40 % of the working population belongs to the last mentioned group. Directive 86/378/EEC is reflected in the Social Security Act no. 117/1993; the Gender Equality Act no. 96/2000 and the law on employment benefits no. 93/1993.

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<sup>41</sup> Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds, no. 129/1997.

2. *What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

The Act on mandatory insurance of pension rights and on activities of pension funds – otherwise known as the **Pension Act** provides for compulsory pension fund membership of all employed persons. A minimum pension premium shall be 12% of wages. Membership in a pension fund may be determined in a collective bargaining agreement, by special legislation or through a hiring contract. Along with a compulsory membership, a minimum benefit right is defined. Individuals are accorded the right to establish individual retirement accounts, either with the pension fund where they pay the compulsory minimum premium or with any other qualified financial institution. The Pension Act was passed into law in 1997 and is intended to provide a comprehensive legal framework for all general pension funds whereby the rights of pension fund members are clearly defined, the obligations of pension funds, both as payers of pensions and investors, are spelled out and the transfer of members from one fund to another are facilitated without a loss of accumulated rights. In addition to the Pension Act, several pension funds – notably the Pension Fund for State Employees - are subject to special legislation.

The Pension Act greatly improves the rights of individuals for a protected pension, even if they change jobs and membership in pension funds throughout their working lives. It sets a framework for the operation of pension funds that should ensure their financial soundness and provide for a pension fund system that will carry the bulk of pension needs in Iceland for years to come.

3. *To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

According to the Pension Act all employees receive the same benefits for equal contribution independent of the longer life expectancy of women than men. The life expectancy for a new born girl is now 82.9 years and for a new born boy 78.6 years.<sup>42</sup> Individuals receive payments from the occupational funds throughout their lives.

4. *Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes*

Occupational pension funds which enjoy state or municipal guarantee are defined-benefit schemes. Occupational pension funds on the general labour market are defined-contribution-schemes. If property is the paradigm then the defined-contribution scheme is prevailing.

## **IRELAND**

*Frances Meenan*

### **a) General scope of the Directive**

1. *Which sickness, invalidity, old age, accidents at work and occupational diseases schemes and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

Employers and employees pay Pay Related Social Insurance (PRSI) contributions. Most contributory entitlements are based on the number of weeks of contributions. The social welfare provisions are contained in the Social Welfare legislation but it must be emphasised that such legislation whilst complicated is only framework and there are exceptionally detailed rules and regulations in respect of social welfare entitlements.

- a. State Pension (Non – Contributory) (formerly Old – Age) (from age 66 years)
- b. State Pension (Contributory) (formerly Old – Age) (from age 66 years)

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<sup>42</sup> According to statistics for the years 2001-2005.

- c. State Pension (Transition)
- d. Pre – Retirement Allowance (i.e. up to age 66)
- e. Blind Pension
- f. Disability Allowance – long term means tested
- g. Illness Benefit – short – term contribution based payment
- h. Disablement Benefit
- i. Invalidity Pension – long – term contribution based
- j. Occupational Injury Benefit
- k. Health and Safety Benefit (when a person cannot work during pregnancy or having recently given birth because it could affect the health of the mother or child – the same amount as under Disability)
- l. Job Seekers Benefit (Insurance contributions)

As regards allowances or social assistance which is meant to supplement the schemes – there is available for persons on the State Pension a Living Alone Allowance and Household Allowance e.g. contribution towards electricity, gas, free TV licence etc. All persons aged 66 years or over are entitled to free travel on public and some private transport on the island of Ireland.

The Job Seekers Allowance is paid when persons have used up all their ‘benefits’ and then on the reduced allowance i.e. as opposed to Job Seekers Benefit. The Back to Work Allowance, Back to Work (Enterprise) Allowance, Back to Education Allowance, Part – Time Job Incentive Scheme, Vocational Training Opportunities Scheme – all these schemes provide additional allowances or supplements for persons who may wish to go back to work or enter the workforce. In summary they provide for granting of various benefits if persons wish to obtain higher education at a later age.

It should be noted that there is provision for Carer’s Benefit and Carer’s Allowance when persons have to leave the workforce or only work shorter hours due to looking after incapacitated relations in their home. The Carer’s Leave Act 2000 (as amended) provides that a person is entitled to carer’s leave of up to 104 weeks with a full right of return to work.

2. *As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

I could not find any specific percentage figures other than the breakdown of male and female which I have taken from the Statistical Bulletin of the Department of Social and Family Affairs. I have worked out the following percentages myself and have just provided the key figures. ***It is important that these figures are not published or relied on.*** They are a guideline only:

1. In 2006 there were a total of 291,300 persons<sup>43</sup> whose principal economic status was retired. Using the most up to date population figures<sup>44</sup> there is a total population of 4,239,848 people living in the republic of Ireland. Therefore the percentage of retired person to the total population is 6.8 %.
2. In 2005 the proportion of persons in receipt of Old Age (Contributory) (now State) Pension<sup>45</sup> was 124,611 (63.9 % male and 36.1 % female) and then using the most recent total population figure – the percentage is 2.93 %. As this is a contributory pension it might be useful to see what the proportion is as against the persons at work so compare 124,611 with the total persons at work being 1,940,800 the percentage is 6.42 % (I have excluded the unemployed)
3. In 2005 there were 91,047 persons (72.9 % male and 27.1 % female) on Retirement Pension. Therefore as a total of the total population it is 2.14% and of the working population it is 4.69 %.
4. In 2005 there were 109,017 persons (11.7 % male and 88.3 % female) on Widow/ Widower’s (Contributory) Pension.
5. In 2005 there were 84,454 persons (42.1 % male and 57.9 % female) on Old Age (Non – Contributory) (now State) Pension (i.e. social assistance) – 2 % of the total population.
6. In 2005 there were 11,058 (78.1 % male and 21.9 % female) persons on Pre – Retirement Allowance (social assistance) – i.e. .56 % of the working population.
7. In 2005 there were 14,729 persons (2.2 % male and 97.8 % female) on Widow/ Widower’s Non – Contributory Pension (social assistance).

<sup>43</sup> See <http://www.cso.ie> – Principal Statistics – persons aged 15 years and over classified by sex and principal economic status.

<sup>44</sup> Census 2006 – <http://www.cso.ie>.

<sup>45</sup> See Principal Statistics – Recipients by Type of Old Age Pension (Number).

3. *What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e. are people excluded because they work in minor employment like in case Nolte, C – 317/93, in non – remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

The main reasons for exclusion is that the individual earns less than 38 euro per week and thus only pays class J Pay Related Social Insurance and is then only entitled to occupational injury benefit. Such persons would be mainly women so it is arguable that there is ongoing discrimination.

There is a homemaker's (primary full – time care for children or for an incapacitated person of up to 20 years) disregard which came into effect in 1994. This means that those women who stayed in the home looking after their family prior to that date may loose out in the number of years of contributions or deemed contributions in respect of the State pension.

Prior to 1991 part – time workers i.e. those working under 18 hours per week were effectively excluded from social insurance. Since 1991 most part – time workers are now included in the social welfare scheme. However this group then would have reduced social welfare contributions i.e. number of years of contribution and arguable this could be deemed to be indirect discrimination as the vast majority of such employees are women.<sup>46</sup>

There is a two year rule where if a person has no social insurance contribution for more than two years they must have 26 paid contributions (i.e. weekly contributions) before credits can be awarded. This can affect women who cared for their children in the home and now that they are grown up wish to access and return to employment.

4. *In which areas and to what extent especially women are excluded from benefits, from access to the schemes or from more generous benefits?*

The main problem is in respect of contributory pension e.g. the State pension a woman may not have enough contributions. This could be for example if they have a large family spanning many years that they would loose out on contributions. However in the main all movement in the tax and social welfare system is towards individualisation.

5. *How could this situation be amended?*

For example there could be averaging of income over a period of time, i.e. so that for the period of time when 38 euro or less was being earned that if there were period of earlier payments where say the person was working full time and/or if they earned monies over the limit in the future then the period when they were earning the lower amount could be disregarded by taking the average.

The individual could be allowed get credit for years prior to 1991.

The classic way of amending any rule or regulation would be to amend by applying the scheme retrospectively e.g. the homemaker's scheme back to 1973 (when Ireland joined the EC).

The two year rule can be amended by giving women a re – entry credit when they wish to re – enter the labour market, i.e. are available for work.

I have not referred to assisting spouses who are not entitled to make any PRSI contribution which would entitle them to old age contributory pension or maternity benefit.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. *Article 3 (2) of the Directive provides for family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

There would appear to be gender equality in for example the provision of the 'qualified adult' allowance and the 'qualified child' allowance. The only time that the pensioner is not getting the full increase say for a qualified child is where the partner is entitled to a social welfare payment in their own right then they each get half the qualified child entitlement.

All payment continue for six weeks following death.

Family Benefits, e.g. Household Package appears to be gender neutral and is reliant on the Household and age and means as opposed to sex. There does not appear to be direct or indirect discrimination.

In respect of the Widow/ Widower's pension any additional payment are on age. It should be noted that such payment comes to an end if the recipient re–marries or lives with another person as husband or wife. It should also be noted that you either get the Widow/ Widower's Pension or the State Pension but not both.

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<sup>46</sup> See Cousins, Mel , *Social Welfare Law*, Thomson Round Hall, 2002 generally at p. 56.

2. *Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc. mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

In Ireland there have always been equal statutory pension ages for men and women.

3. *What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

As stated there are equal State pension ages for men and women and any other benefits are on a household basis. There are of course the additional payments for persons who have qualified children living with them (they may not be their own) but they are under 18 years and or under 22 years if in full time education. However again such allowances/ additional payments appear to be gender neutral.

4. *Should these exclusions in your opinion be repealed? Please specify, which and why?*

This does not appear to be applicable.

## **II Directive 86/378/EEC as amended by Directive 96/97/EC**

1. *Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work – relationship) and occupational schemes (which are related to pay and to a work – relationship)?*

Second pillar pensions are pensions received in addition to first pillar pensions. In Ireland these may be occupational pension schemes, Personal Retirement Savings Accounts or other personal pensions. They can also be called supplementary provision .

Occupational benefits schemes are defined in Part VII of the Pensions Act 2004 (as set out in the Social Welfare (Miscellaneous Provisions) Act 2004). There cannot be discrimination (direct or indirect) on grounds of gender, marital status, family status, age, race, religion, sexual orientation, disability and the Traveller ground. The definition includes schemes for both self – employed and employed persons. ‘Benefits’ include:

- (a) termination of service
- (b) retirement, old age or death
- (c) interruptions of service by reason of sickness or invalidity
- (d) accidents, injuries or diseases arising out of or in the course of a person’s employment
- (e) unemployment
- (f) expenses incurred in connection with children or other dependants.

And in the case of a member who is an employee, it includes any other benefit corresponding to a benefit provided by virtue of the Social Welfare Acts, the Maternity Protections Acts 1994 – 2004 or the Health Acts 1947 – 2001, which is payable to or in respect of the member as a consequence of his employment.

This definition in fact means more than what we would commonly call pensions, i.e. income retirement. Therefore this Act in fact covers income continuance payments prior to retirement, maternity benefit and expenses incurred with children or other dependants.

This definition was used so as to ‘highlight’ the concept of the principle of equal treatment as a broader concept.

It should be noted that most private sector defined benefit schemes are integrated with the State social insurance system (Pillar 1). The contributions payable and the benefits received take account of the Pillar 1 pension. Within the public service, some scheme members are subject to integration while others are not. Civil servants recruited after March 1995 pay full rate PRSI and are subject to integration; those recruited before that date pay a modified PRSI and have no entitlement to Pillar 1 benefits and are therefore not subject to integration.

2. *What percentage of men and women in your country (gender – desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pensions system?*

The percentage of the workforce in occupational pension schemes (i.e. supplementary provision) has been a cause for concern. The numbers in the workforce are much higher than was anticipated in the 1990s.

It is likely that the increase in the workforce has made the supplementary pension coverage lower than it would otherwise have been. In the short – term those, those who have recently joined the workforce are less likely than others to voluntarily consider pensions coverage. This lack of coverage is high probably as a result of reduced unemployment, higher female participation and immigration.<sup>47</sup>

In 2004 the pension coverage of the total workforce was 52% with this being broken down into men 56% and women 47%; with 43% of self – employed having cover compared to 54% employees.<sup>48</sup>

The level of coverage and adequacy for women are of particular concern to the Pensions Board and the Minister for Social and Family Affairs specifically asked that this issue be looked at by the National Pensions Review in February 2005. It was noted in the Report that as women comprise the larger part of the lower paid, younger and part – time workforce and because of the work patterns of their lives women are more likely than men to have inadequate pension provision. Furthermore women are more likely to have taken time out of the paid workforce to care for children, which affects both the likelihood of pension saving and its adequacy. The proportion of pension contracts begun by women is less than expected, even allowing for lower average income and age. Furthermore PRSA and other data show that the average pension contributions made by women are less than by men, even after adjusting for differences in age and income.

It was noted that there are other economic, social and cultural factors operating which appear to make pensions a lower priority for many women and make them less likely to provide for themselves.<sup>49</sup>

It should be noted that there are considerable tax advantages in respect of both employer, employee and self employed pension contributions.

### *3. To what extent according to your estimation actuarial factors are used in this pillar?*

Occupational pension schemes promise benefits on a future date. Therefore defined benefit schemes will calculate pension benefits at a future date when the member is near to retirement. An actuary is required to estimate future liabilities. The actuary's role in advising the trustees of a defined benefit scheme and the sponsoring employer is regulated by Part IV of the Pensions Act 1990. This provides for solvency tests and certification that the scheme is properly funded and provides for a valuation report on assets and liabilities.<sup>50</sup>

Defined contribution schemes know their liabilities in advance therefore actuarial valuations are generally not required. However an actuary may be retained from time to time to estimate whether the agreed contributions are sufficient to provide reasonable benefits. If not contributions rates may need to be revised.<sup>51</sup>

The Pensions Act sets out specific and detailed provisions in relation to rules of a scheme which do not comply with the provision of equal treatment. These provisions render unequal rules null and void and automatically equalise the terms of the scheme to provide the equivalent treatment. Where there are provisions which infringe the principle of equal pension treatment on the gender ground and which provisions purported to have effect on or after 5 April 2004 (the date of commencement of the Act), the provision is levelled up from that date until equalised on another basis. In the case of a provision which purported to have effect before 5 April 2004 but not being earlier than 8 April 1976 then if the relevant provision relates to employed persons, compulsory levelling – up will apply from the date on which the provision purported to have effect provided that the levelling up does not apply earlier than:

1. 17 May 1990, or
2. in the case of employed persons who had initiated proceedings before 17 May 1990 or who had been denied access to a scheme, 8 April 1976.

### *4. Which tendency is prevailing in your country: defined – benefit schemes or defined – contribution schemes*

Until relatively recently the most common type of occupational scheme was a defined scheme but this has changed in recent years with a steady shift towards defined contribution schemes.<sup>52</sup>

<sup>47</sup> See § 1.12 of National Pensions Review.

<sup>48</sup> 2004 CSO Survey and at Table 4.9.

<sup>49</sup> 4.23 – 24.

<sup>50</sup> See *Irish Pensions Trust v First National Bank of Chicago* unreported High Court, Murphy, J. 15 February 1989. Also note that there are Occupational Pension Schemes (Funding Standard) (Amendment) Regulations 2005 (SI no. 595 of 2005).

<sup>51</sup> See generally *Irish Pensions Law and Practice 2<sup>nd</sup>* Ed., Finnucane and Buggy, Thomson Round Hall, 2006.

<sup>52</sup> see § 3.2.2 of Life Strategies/ ESRI Report on Alternative Systems of Pension Provisions, September 2005



Almost all public servants are covered by defined benefit schemes and in general are similar to defined benefit schemes in the private sector.

*5. In case of discriminatory benefits or discriminatory calculation of pension rights did the equalising law in Member States provide for reconsideration of 'old' pensions, i.e. did the new law have retroactive effect back to the date of the Barber judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

Pensionable age has been the same for men and women in Ireland and thus we have been spared extensive litigation. This is also required by Part VII of the Pensions Act.

### **III The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

The third pillar is provision for retirement arising from non – pension private saving or asset accumulation.

In Ireland one has always thought of the systems being different so therefore the three pillars made sense in that we were dealing with different pieces of legislation and different enforcement procedures. However it is when one considers the equality provisions in the 2004 Act being defined as having similarity with the payments under the social welfare code that the two pillars are blurred.

In this writer's opinion there would be merit in having all the equality legislation consolidated into one Act. In Ireland it would be difficult separating the social welfare legislation but there would be merit in having a framework Act setting out the principles of equal treatment in respect of social security and pensions. State services such as social welfare services are excluded from the Equal Status Acts 2000 – 2004. In addition the provision of social welfare legislation appears to be excluded from the Equal Status Acts. Hence the merit in having a general overriding statute.

*2. Do you think that this pillar – based approach is rather conducive or rather a hindrance to gender equality?*

In this writer's opinion it could be a hindrance because of the volume of Irish legislation arising from the number of Acts. There is merit in simplicity and so that people will understand the concept rather than having it buried in a multitude of statutes. Therefore there may well be merit in having a consolidated directive (i.e. recast).

The National Pensions Review was published by the Pensions Board in 2005. In brief there was a projected increase in the cost of first pillar pensions and one recommendation was that retirees be given the option of deferring drawing down their pension to a later date in exchange for a larger pension; secondly there was concern at the lack of private occupational pensions. There was a recent debate about making such pension schemes mandatory.

If there was a consolidated Directive it could assist in having streamlining of pension litigation as it applies to gender. In Ireland if you wish to litigate in respect of pension you must go to the Equality Tribunal and to a Deciding Officer if you wish to appeal any issue in respect of gender equality and social welfare. There would be merit in having one set of procedures for litigation. However it must be stressed that there has been little litigation in respect of pensions.

The Review and its Appendices provide a valuable overview of pensions in Ireland. There does not appear to be any specific reference to gender.

## **ITALY**

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### **I. Directive 79/7/EEC**

#### **General scope of the Directive**

1. Social security benefits belonging to the first pillar under Article 3.1 a) of directive 79/7/EEC:
  - Invalidity, old age and survivors' insurance
  - Industrial accidents and occupational diseases insurance
  - National Health Service and Sick benefits for common diseases
  - Unemployment insurance; short-time earning funds; mobility allowance.

Social assistance schemes under Article 3.1 b) of directive 79/7/EEC:

- Supplementation of pensions to the minimum: This benefit can be regarded as included within the material scope of directive 79/7, this either as part of the statutory schemes of old age and invalidity (article 3 (1) (a)), or as benefit intended to supplement the old age and invalidity insurance schemes, according to article 3 (1) (b) of the directive.
- Social allowance, for Italian citizens aged over 65, with low earnings: The social allowance took over from social pension on 1 January 1996. The old social pension had been regarded as 'supplementary' by the EEC Court of Justice in case Piscitello (139/82); the ruling of the Court concerned the material scope of the social security provisions for migrant workers. This decision was essentially based on the fact that the social pension is provided as of a right. The criteria used by the ECJ in the field of equality in order to determine the supplementary nature of a scheme are, however, more restrictive. It is difficult to affirm, in particular, that the present day social allowance is directly and strictly linked to the social insurance schemes.
- Civil invalidity benefits: The inclusion of the civil invalidity benefit under article 3.1 b) of the directive is subject to the same doubts expressed as regards the supplementary nature of the social allowance.

2. Personal scope of application of the benefits covered by the directive. Percentage of coverage of the benefits addressed by the directive 79/7:

Invalidity, old age and survivors' insurance: Insured individuals: 25,023,625, corresponding to the 42.8 % of the population. Pensioners: 16,560,879 (equal to 28.3 % of the population), of whom the 68.4 % are entitled to a unique pension, the 24.2 % are in receipt of 2 pensions and the 7.4 % get 3 pensions. Total of pensions paid: 21,893,129 of which 10,881,960 are old age pensions, 2,069,366 are invalidity pensions, 4,573,787 are survivors pensions, 2,185,037 are civil invalidity pensions and 769,497 are social allowances.

Unemployment benefits: Unemployment insurance: 742,979 recipients; Mobility allowance: 105,177 recipients. Short time earning funds: 16,996,500 hours annually paid, corresponding to about 424,912 full-time working weeks.

Industrial accidents and occupational diseases insurance: 20,000,000 insured individuals; about 1,000,000 industrial accidents a year (source of the data: Istat 2006, which reports data of 2004. Resident population at the time: 58,462,375).

However, in order to understand the exclusions from social security provisions covered by the directive, it is also necessary to outline the subjective scope of the different benefits.

## **I. Benefits under article 3.1 a) of directive 79/7:**

### **A) Invalidity, old age and survivors' insurance.**

**a) Old age pensions - Pay-based system** (for workers with at least 18 years of contributions on 31 December 1995; for workers with less than 18 years of contributions on 31 December 1995 the mixed system applies). Pensionable age: 60 years for women and 65 for men; individuals who have taken advantage of parental leave have a right to lengthen employment, even as a dispensation to the regulations regarding pensionable age, for a period corresponding to the duration of the leave taken. Women are allowed to remain in service until attainment of the age laid down for the retirement of the worker.

Contribution requirements: at least 15 years of obligatory insurance and contributions or the equivalent (figurative, voluntary or by redemption). At present, in the old pay-based system, alongside the old age pension (i.e. based on the claimant's age of retirement), there exist the retirement pension, which is based on the number of years spent at work. In order to qualify for this pension, the present days rules demand an age of 57 years and 35 years of contributions, or, alternatively, 40 years of contributions without limit of biological age. However, the 2004 reform increased the age limit to qualify for retirement pension up to 60 years, starting from 2008; this limit is increased to 61 years, by 2010, and then brought to 62 years, by 2014.

**b) Old age pensions - Contribution system** (applied in full to workers taken on after 1 January 1996; the right to choose between the contribution system and the mixed system was granted to workers with at least 15 years of contributions on 31 December 1995, of which at least 5 years are under the new system). The requirements for access to pensions in the new contributory system are the following: reaching the pensionable age of 57 years, or 40 years of contributions; minimum period of contribution of 5 years; the total of contributions paid must be such that the total of the pension corresponding to them is at least equal to 1.2 times the state social allowance, or, alternatively, the worker must be at least 65 years of age.

c) *Survivors pensions*. We have two kind of survivors pensions. The convertible pension, that is paid to the survivors of a worker who at the moment of death had already retired; the following are convertible: old-age pensions, invalidity pensions, disability pensions, years of service pensions; the following are not convertible: the invalidity allowance, the social allowance and the yields of insurance against injury at work. The indirect pension, on the other hand, gains title from the death of the worker, who must have accrued the insurance and contribution requirements laid down by the law for the relevant payments. The following have the right to the survivors' pension: the spouse and children, including those recognised as having equal rights; in the absence of spouse and children, the parents; in the absence of these also, unmarried brothers and sisters.

d) *Invalidity benefits scheme*. Entitlements to invalidity benefits depends on the fulfilment of contributions and insurance conditions: 5 years of contributions, three of which during the last 5 years preceding the application. If the invalidity or inability have been caused by an occupational accident or disease, entitlement to benefit is not conditioned by contribution requirements.

**B) Industrial accidents and occupational diseases insurance**. As regards the coverage of the insurance scheme, one has to make a distinction between the personal and material scopes of application. Under the material scope of the scheme only dangerous activities are covered. The definition of dangerous work given by the law covers the great majority of dependent workers. Under the personal scope of application, on the other hand, all the employees who carry out manual activity, all workers employed in plants where there are automatic machines, as well as works superintendents, home workers and those employed in housework are covered. Recently, the coverage of insurance has been extended to a particular category of self-employed workers, whose relationship with the main contractor is characterized by coordination, continuity and is prevalently personal. Insurance also covers persons who are not engaged in a formal employment relationship but are nonetheless exposed to the risk, such as assisting relatives in the family business and subjects aged between 18 and 65, who perform care work in the home, without pay and for one person only.

**C) Sickness schemes for common diseases**. Patients who are covered by sick benefits include the following: workers in industry and assimilated categories; agricultural labourers; home workers; traders and similar workers; the collaborators continuous and coordinated and the self-employed enrolled in the INPS scheme reserved for them.

**D) Unemployment Benefits**. The *Unemployment insurance* covers all the workers who are at least 14 years old and who are gainfully employed under a contract of service. The contribution conditions for entitlement to benefits are as follows: a) two years insurance; b) payment or crediting of one year contributions during the two years before the beginning of the relevant benefit year. In relation to seasonal and precarious workers, 78 days of actual work carried out during the benefit year in the insured sectors are regarded as sufficient for the fulfilment of the second qualifying condition.

*Short time earning funds*. They had been conceived as an instrument to provide temporarily stopped workers with an income for the working hours lost as a result of a diminution in the requirements of the employer's business. Under the general normative of the industrial sector, there are two different types of intervention depending on the kind of crisis that affects the enterprise: the 'ordinary' and the 'extraordinary' interventions. The former is reserved to a reduction or suspension of the enterprise activity due to either 'transitory involuntary events which cannot be imputed to the employers or to the workers' or to 'cyclic downturns'. The latter concerns reductions or suspension of productive activities due to the enterprise 'crisis', 'conversion', 'reorganisation' or 'restructuring'; the extraordinary intervention is also allowed when the employer is submitted to an insolvency procedure. The interventions are reserved to those workers in relation to whom it is planned the re-insertion in the firm's productive activity. The "extraordinary" short-time earning funds are operative exclusively within the firms that have employed an average of more than 15 workers during the six months period prior to the intervention. Moreover, it is paid only to those employees who have been working in the relevant firm for at least 90 days.

*Mobility allowance*. The mobility allowance operates exclusively in the sectors covered by the short-time earning funds and is paid to workers involuntarily unemployed as a result: of a dismissal declared by employers unable to maintain all the jobs once the short time period is exhausted; of a redundancies procedure; of a dismissal declared by employers under an insolvency procedure. To qualify for the mobility allowance, the claimant must have been employed in the relevant firm for at least 12 months, 6 of which must be of actual work; the periods of holidays, of maternity leave and leave for recovery from an industrial injury are regarded as actual work.

## **II. Benefits under article 3.1 b) of directive 79/7:**

**A) Supplementation of Pensions to the minimum - Pay-based pensions scheme.** This payment guarantees the sufficiency at the lower end of old-age pension payments, to prevent the sums of pensions from being laughable. It is paid if the insurance and contribution minimums have nevertheless been achieved. The supplement is excluded if the single pensioner has an income over 11,117 euro per year, or if the pensioner's income plus that of his/her spouse are over 22,234 euro per year. Whenever the income is lower than these limits, supplementation is granted in such a proportion as not to cause the relevant limit to be exceeded. However, it is to be remembered that supplement to the minimum was abolished by the pension reform of 1995 for all workers beginning employment after 1 January 1996 (and possibly for those who, even though they have the right to the mixed system, opt for the new one). In the new regime, the role of supplementation to the minimum should be effected by the social allowance payment.

**B) Social allowance.** The first condition to be met when applying for social allowance is Italian citizenship; the applicant must not only be an Italian citizen when the application is made, but also as long as the benefit is paid. In addition to citizenship, the applicant must reside in Italy. Another condition is that the applicant must have at least 65 years of age. The final requirement is that the applicant has earnings inferior to 4,962 euro per year. If the applicant is married, the spouse's earnings are taken into consideration and the threshold is doubled (9,924 euro per year). However, if the applicant or his/her spouse have earnings, the social allowance will be reduced proportionally. If these thresholds are exceeded the benefit is withdrawn.

**C) Civil invalidity.** This is a public assistance benefit for those invalid persons aged 18 to 65 who do not fulfil insurance requirements. On reaching 65 years of age, the civil invalidity pension and allowance are automatically converted into the social allowance. The pension is excluded if the applicant owns income is over a certain level. The recipients have to be Italian citizens and reside in Italy; EU nationals who reside in Italy for work purposes may also be eligible.

### **3-4. Exclusions from benefits covered by the directive and less favourable treatments: main reasons**

#### **A) Invalidity, old age and survivors' insurance.**

**a) *Pension Statutory scheme - Pay based system.*** Under this scheme, amount and number of contributions paid and continuity of payment determine the eligibility to social insurance as well as, in many cases, the benefits level. The increase in minimum insurance and contribution requirements which has taken place in Italy during the last decades is bound to have a negative impact upon the pensions of all the atypical workers, such as intermittent, temporary, occasional and part time workers. Irregular attachment to the labour market which afflicts the atypical workers, and among them certainly the women, endangers, in fact, the fulfilment of contribution conditions.

As long as part time workers are specifically concerned, insurance and contributions periods for the purpose of determining the pension amount (and accordingly to some scholars also for the purpose of both the crediting of weekly contributions and the definition of the insurance period) are calculated proportionally to the number of hours effectively worked; therefore, they are not credited with contributions for the weeks when they do not carry out their work activity and this can noticeably endanger the contribution record of vertical part-timers.

Moreover, as far as the pension amount is concerned, decreases of earnings during the period of reference for the calculation of pensionable pay (normally the last 10 years) determine in turn a decrease of the pension benefit. Therefore all those who have high pay fluctuation are disadvantaged in relation to the definition of pension amount. However, those who earn less than 171 Euro a week have a proportional re-calculation of their contribution period for the purpose of pension amount: this causes a lengthening of the period of reference for the calculation of pensionable pay and in turn an increase of the pensionable pay and thus of the pension.

Again, a temporary worker will have substantial reductions of his/her contribution period for the purpose of pension amount and this will naturally cause a reduction of the pension amount: if, for example, one works for 40 years under temporary contracts of 6 month a year, he/she will have the contribution period reduced to 20 years and in the end he/she will have a pension of an amount equal to 40 % of the earned pay (a quota or rate of yield of 2 % X each year of contribution accredited); if the same worker had worked for 40 years with a contract of employment of indefinite duration, his/her pension would have been equal to the 80 % of the earned pay.

In general terms, a social security system essentially based upon the employment status of the claimants strongly penalise those persons who are in a situation of need and do not have a good employment record; in particular, as the care of the family is mainly entrusted to women, this can result in their exclusion from the labour market and consequently from contributory benefits, which means in Italy to rely either on the social allowance or on civil invalidity benefits, the amount of which is quite low.

**b) Statutory scheme - Contribution system.** In relation to the calculation of the new contributory pensions, the earnings variations as well as the continuity and regularity of employment of the claimants appear to be of crucial importance: the amount of the individual contribution total is indeed very sensitive to these factors. The same goes for the fulfilment of the total amount of pension requisite rather than for the five years contribution period: in order for the pension to be at least equal to 1.2 times the state social allowance, much more than 5 years contributions are needed. Here again, therefore, the pensions rights of atypical workers, intermittent, temporary, occasional and part time workers as well as those of workers with earnings and careers inferior to the average standards will be at stake.

The coefficient of transformation, according to which pensions are calculated, are representative of the average remaining life expectancy, calculated on the basis of statistical-actuarial criteria, in connection with the age of retirement: well, these are the same for men and women despite women have a higher average remaining life expectancy. This, however, seems to be perfectly compatible with the social insurance nature of the scheme: the strict coherence with insurance features is indeed proper for private insurance and not for social security provisions. And also it appears as a sort of compensation for the *de facto* more fragile contribution record of women. And indeed, more favourable coefficients of transformation are provided for maternity, in relation to which the increment of one year of the coefficient of transformation for one or two children and two years for three or more is laid down.

**c) Survivors' pensions.** The survivors' scheme does not show discriminatory features. However, the abolition of supplementation of pensions to the minimum and its substitution with the social allowance operated by the new contributory system renders the regulation of survivors' pensions that do not reach the minimum level problematic, provided that the social allowance has a non-reversible character.

**d) Article 7 Act no. 638/1983.** This rule concerns all the benefits subject to the fulfilment of contribution conditions, that is to say pensions and unemployment insurance. According to this rule, the number of weekly contributions to be credited annually is equal to the number of paid working weeks; the worker, however, is credited with the weekly contribution in full only if his/her pay is at least equal to the 40 % of the monthly minimum pension, if this ceiling is not reached, the weekly contribution is proportionally reduced. In practical terms, in order to be credited with the full weekly contribution, the worker must gain at least 171 euro a week. Obviously, a proportional reduction of the weekly contribution causes a correspondent reduction of the contribution record and thus a period of time longer than normal will be necessary to fulfil the contribution conditions.

**B) Industrial accidents and occupational diseases insurance.** The scheme does not contain discriminatory features.

**C) Sickness schemes.** According to the general rule, benefits are due also for sickness arisen during the 60 days after the termination of the employment relationship. Temporary workers are excluded from this guarantee. This difference of treatment is not justified.

Workers in domestic or family service are not covered by sick benefits for common diseases: in cases as this, however, the employer takes care of cover for his/her staff.

As for the rest, the scheme does not present discriminatory features.

**D) Unemployment Benefits.**

Here again, the need to fulfil either contribution conditions or periods of employment within the same firm in order to qualify for benefits strongly penalise those persons who do not have a good employment record, i.e. intermittent, temporary, occasional and part time workers, as well as those workers with earnings and careers inferior to the average standards.

Moreover, vertical part time workers have been banned from unemployment insurance, in relation to the periods of suspension of work, on the assumption that the inactivity during those periods is voluntary, as it is part of the working time agreement existing between the employer and the vertical part timer. On the other hand, the temporary workers, who are in the same substantial situation of the vertical part timers as regards the periods of inactivity, are entitled to unemployment benefits. Given that those who are actively looking for work during periods of inactivity can be considered as involuntarily unemployed, it is clearly discriminatory to ban from benefits vertical part timers who are available for work during their periods of inactivity. As many part timers are women, it is also clear that to this respect women are once again among the victims of a discrimination.

Homeworkers and assisting relatives in the family business are excluded from the coverage of short time earning fund and this can turn up to be a cause of indirect discrimination towards women who more frequently than men are homeworking and assisting spouses.

Temporary, seasonal and precarious workers are excluded from the mobility allowance and this can be of direct concern once again for women.

**E) Supplementation of pensions to the minimum.** Aggregations of income in order to determine entitlement to benefit and its amount can engender indirect discriminations. Indeed, even if the threshold is doubled when the income of the spouse is taken in consideration, the benefit may be refused more frequently to women than to men, provided that men generally have incomes higher than women. It might be difficult, however, to avoid the objective justification to indirect discrimination represented by the social policy argument that the benefit is only guaranteeing a minimum; nonetheless, as this benefit is paid as of a right only to those who have fulfilled the insurance and contribution requirements under the pay-based system, it can be argued that it is not an assistance benefit but just a device to prevent pensions from being laughable (see on this issue the decisions of the Constitutional Court no. 240/1994, which classifies the supplementation to the minimum as a pension rather than as an assistance benefit and no. 127/1997, which regards the aggregation of income within the supplementation to the minimum scheme as legitimate, but it does not specifically go into the issue of indirect discrimination). Act no. 385 of 2000 has intervened in this area and has established, as a dispensation to general criteria of income aggregation described and with limitation to pensioners of a specific age and with specific contributions, a more favourable income requirement which permits the reduction of the effects of the income of the spouse.

**F) Social allowance.** Here again aggregations of income in order to determine entitlement to benefit and its amount can engender indirect discriminations: indeed, the benefit may be refused more frequently to women than to men, provided that men generally have incomes higher than women. Moreover, in relation to the social allowance, it may be even more difficult to avoid the objective justification to indirect discrimination represented by the social policy argument that the benefit is only guaranteeing a minimum, as we are indeed concerned with a social assistance benefit paid only to elderly people who are in a state of need.

**Civil invalidity.** The scheme does not show discriminatory features.

**G)** Finally, it must be reminded that there are typical female professions not sufficiently covered by social security, such as domestic work, home work, helpers spouses work, voluntary and care work.

It is not yet definitely assessed which kind of social protection could be reserved to those engaged in the family business of Article 230 bis c.c. This is a residual hypothesis: when the working relationship within the enterprise is not classified as one of self employment, as a contract of employment or as a partnership, then this is regulated by Article 230 bis of the civil code. In our social security system, there is not a provision specifically addressing workers engaged in a family business under Article 230 bis. From two decisions of the Constitutional Court in relation to the old age, invalidity and survivors scheme can, however, be drawn the conclusion that these workers are also covered by the provisions of self employed workers. Helpers spouses as such are excluded from family allowances; it is discussed their entitlement to unemployment benefits and sickness benefits. If the work carried out cannot be regarded as a source of income, then there is no obligation to contributions for pensions purposes; the sole social insurance provision that covers helping spouses in this case is the accident at work and professional diseases insurance. However, more recently, in the ambit of craft workers, the free work has been restricted to collaborations lasting until 90 working days in the year, carried out only in the hypothesis of temporary impossibility to work of the entrepreneur.

When homework is qualified as subordinate, the employee is covered by social insurance and family allowances, but the general insurance schemes are not applied to self employed homeworkers.

Domestic workers are excluded from sickness benefits (*Corte Cost.* no. 486/1988).

Any caring activity can spoil the contribution record of claimants in relation to all the insurance schemes.

## **5. Possible solutions**

In this context, it is extremely important to keep the atypical workers, that is to say intermittent, temporary, occasional and part time workers - which are all job positions often taken up by women - within the social insurance system. It must be avoided, in other terms, their confinement to the area of social assistance, that in our country is absolutely inadequate. This also because during their spells of employment they pay insurance contributions, which should not be wasted. Therefore, an important step in this direction could be the improvement of the set of instruments geared to recover wasted contributions, such as the crediting of notional contributions, totalising of contribution, redemption and voluntary contributions.

In our system *notional contributions*, i.e. a fictional contribution paid by the State in substitution of employers and employees contributions, cover, among others: pregnancy, maternity leave and parental leave; unemployment only for those entitled to the unemployment benefits listed above; work absence due to the need to assist handicapped relatives. The notional contribution applies both to the total amount of, and to the right to welfare benefits. Here it is needed a widening of the scope of notional contribution to all the periods of involuntary unemployment or under-employment and of professional training as well as – in the long term - to all the periods of family, care and voluntary work.

*Totalising of contributions* allows the subject who might have accrued various contribution periods in several welfare system to gain a split, or pro-rata pension payment from the various schemes through a single calculation of the various insurance blocks. This instrument is important because consent to the worker with a fractionated contribution record to gain a pension; this operation is free of charge for the worker. The conditions to be fulfilled in order to be entitled to totalising (6 years contributions in any scheme; 20 years contribution in total with 65 years of age or 40 years contributions) are however too restrictive and ought to be relaxed so as to widen the area of application of this mechanism. *Redemptions* allows additional contributions, referring to periods of working life which did not permit contributions to be made, to come into the individual's pension position. Thus redemption can be used, among others, in relation to: the periods of inactivity of the intermittent, occasional, seasonal, temporary workers; the periods of pregnancy and maternity leave; the periods of professional training. It also serves to integrate contributions paid in periods of reduced pay treatment, as for example in the case of part-time work. The costs of redemption are to be paid by the interested party and this makes the mechanism less desirable to our ends. The same considerations can be made for *voluntary prosecution of contributions*, which can be used quite in the same hypothesis of redemption. Here, therefore, it would be desirable a participation to the expenses of redemption and of voluntary contributions by the social security system.

Another important step for the inclusion of atypical workers in the social insurance system would be that of abolishing the actuality of contribution condition: in other terms, the condition of three years contributions during the five years preceding the claim, for the invalidity pension, and that of one year contributions during the two years before the claim, for the unemployment insurance should be repealed. Actuality of contribution is indeed a requisite almost impossible to be fulfilled by workers with recent spells of inactivity. In both cases, the ordinary contribution condition - 5 years insurance for the invalidity and 2 for unemployment – would be sufficient to preserve the social insurance nature of the scheme. Besides that there is no reason to ban from benefits claimants who have fulfilled the ordinary contribution condition but have not the actuality of contribution as a result of their recent spells of inactivity.

Another measure that could be taken is that of providing all those workers who have fulfilled the contribution conditions with a minimum benefit in order to grant them social integration (Article 3, 2° § Constitution). This would prevent atypical workers, and among them women, from having benefits inferior to the minimum level to live on: their benefit, corresponding to the contributions paid, would be topped up to the minimum, as it used to happen with pensions before the 1995 reform.

As regards vertical part-timers contributions records in relation to the pay-based pensions system, we mentioned that they are not credited with contributions for the weeks when they do not carry out their work activity: here it would be sufficient to eliminate the word 'paid' from the text of the rule of Article 7, 2° §, Act no. 638/1983 in order to make the crediting of weekly contribution on the basis of the average pay rather than on the basis of the number of paid weeks.

As regards pay fluctuation during the period taken into consideration for the calculation of pensionable pay in the old pay based system, a solution was found only for part time workers: a rule (Article 9 d.lg.vo no. 61/2000) provides that the length of service for the purpose of pension amount is calculated for the full in relation to full time work and proportionally to the time effectively worked as regards the part time work. In this way, the period of reference for the calculation of pensionable pay is lengthened, the spells of part time work are absorbed and do not lower the pensionable pay and in turn the pension amount.

In relation to unemployment insurance the solution, already mentioned, adopted for seasonal and precarious workers is interesting: the qualifying condition of one year contributions during the two years before the beginning of the relevant benefit year, has been replaced by 78 days of actual work carried out during the benefit year in the insured sectors. However, it remains to be fulfilled the two year insurance condition. Moreover, the benefit paid in this case is lower than the ordinary one, while its duration is determined with reference to the days worked in the previous year. Thus it would be desirable at least to repeal the two years insurance condition.

At a social policy level, it has become evident that unemployment benefits are crucial in the fight against the progressive impoverishment linked to atypical working patterns: this area of social protection should therefore be globally re-thought taking into consideration the evolution intervened in the labour market during the last decades. In particular, all the cases where the discontinuity of employment and the underemployment make it impossible for workers to reach income levels sufficient to grant social integration should be included in the social protection for unemployment, as long as the worker is involuntarily inoperative and is actively looking for work: that would correct discriminatory situation, such as of the vertical part timers who loose unemployment insurance because are regarded as voluntarily unemployed, despite the fact that they have taken up what was available in that moment in the labour market and are actively looking for job in order to reach a decent income.

In relation to social assistance provisions, it would be desirable to find out instruments of means testing different from income aggregation so as to avoid discriminatory features.

The gaps in the social protection of domestic work, home work, helpers spouses work, voluntary and care work should also be tackled. The social insurance fund for unpaid care workers cannot be an adequate answer as it is purely voluntary, and contributions must be paid by workers who carry out unpaid work within the family.

Finally, our system should be provided with a minimum income protection for those in need who did not manage to qualify for the social insurance protection. At present, we have only social security provisions for aged or invalid subjects and their amount is quite low. We have experimental provisions on a sort of 'last instance income', but its institution and financing have been localised, as the trend under the former government was that of dismissing national public assistance and handing it on to local authorities: this meant that the minim income provisions are at a standstill for lack of funds.

## **b) The exclusions mentioned in article 3 (2) and article 7 (1) of the directive 79/7/EEC**

### **1.- 3. Exclusions of article 3 (2) and their effects as regards gender equality**

In our social security system there exists a general family benefit, which is called '*Assegno per il nucleo familiare*'. Part-time workers are entitled to full weekly family benefits when they work at least 24 hours a week (working hours of different employment relationships are aggregated). Part-time employees working less than 24 hours a week are entitled to family benefits in proportion to the number of days spent at work, independently from the number of hours worked a day. Thus, if a part timer works 1 hour a day for 5 days a week, gets 5 daily family benefits, while if he/she works 21 hours a week during 3 days, gets only 3 daily benefits. Moreover vertical part timers do not get any benefit in relation to the spells of inactivity. This is the sole discriminatory feature of the benefit: the limits concerning part-timers working less than 24 hours a week indirectly affect mainly women, who probably represent the majority among the part timers working less than 24 hours a week.

The other family benefits - that is to say maternity and paternity leave, parental leave, leave for illness of a child, leave for parents of seriously handicapped children, leave for serious family reasons, daily rest for mothers and fathers, rest periods and leave of absence for severely handicapped workers and for parents of handicapped children, redemption periods and notional contributions as regards parental leave and child rearing, notional contributions as regards the care of handicapped relatives – do not show discriminatory features in relation to gender equality.

Survivors provisions are part of the old age pension system.

### **2. – 3. Exclusions of article 7 (1) and their effects as regards gender equality**

The exclusion of article 7 (1) have been used in our social security system in relation to pensionable age and to the advantages as regards old age pensions for the purpose of child rearing (Article 7 a) and b)).

*Pensionable age in the Pay-based system. Women pensionable age for the purpose of old age pension is set 5 years lower than that set for men. Given the women higher life expectancy, the possibility of anticipated access to pension implies a higher real rate of yield of women's pensions than men's .*

Women can, however, carry on working until the pensionable age set for men: to this purpose, the Corte costituzionale has extended the protection against unfair dismissals for women to the extra period that they can choose to spend at work. However, the different pensionable age for men and women might have consequences in relation to the discipline of early retirement: these provisions have often recognised, coherently with the different pensionable age, a contribution credit to women for the purpose of retiring earlier lower than that of men; the Corte Costituzionale has intervened on the issue several times and has declared the relevant provisions unconstitutional (decisions no. 371/1989 and no. 134/1991).



On the other hand, women who decide to keep on working until the age of 65 have the same incentives as those provided for men in terms of increase of 0.5 % per year of extra work of the yield rate, but for a longer period due to the different pensionable age (10 years from 55 to 65, for women, rather than 5 years, from 60 to 65, for men): women therefore benefit of a higher incentive than men to lengthen the period spent at work.

*Pensionable age in the contribution system.* Pensionable age is now flexible between 57 and 65 years. However, the 2004 reform restated the old pensionable age system, as it fixed, from 2008 on, the pensionable age at 60 years for women and 65 for men. A different pensionable age for men and women is thus re-introduced. A question to be decided is whether or not women will be allowed to remain at work until the pensionable age provided for men, as it happens now under the old pay-based system.

Furthermore, the reform re-introduced the formerly abolished retirement pension, based on the years spent at work, in the contribution system: in order to qualify for this pension, the present days rules demand an age of 57 years and 35 years of contributions, or, alternatively, 40 years of contributions without limit of biological age; the 2004 reform increased the age limit to qualify for retirement pension up to 60 years, starting from 2008; this limit is increased to 61 years, by 2010, and then brought to 62 years, by 2014. However, those women who are included in the old (and more favourable) pay-based system and opt for the calculation of pensions under the rules of the new contribution regime can apply for the retirement pension with 57 years of age and 35 years of contributions; these reduced conditions are temporarily applied until 2015. The reform also provided that women with children are enabled to retire from work at reduced conditions: these conditions, however, must be decided through consultation between trade unions and the government.

The *advantages as regards old age pensions for the purpose of child rearing* are provided under the new contribution system to the benefit of women. More favourable coefficients of transformation are fixed for maternity, in relation to which the increment of one year of the coefficient of transformation for one or two children and two years for three or more is laid down. Then, in relation to maternity, a reduction in the age of retirement of 4 months per child is granted, with a maximum limit of 12 months.

#### **4. Repealing of the exclusions**

The exclusions of article 3 (2) should be repealed because can be a source of discrimination for women; in particular, in our system the threshold for family allowance should be organised differently, and the benefit amount be related to the hours worked rather than to the days spent at work.

The exclusions of article 7 might be useful to evaluate the different position of women in the labour market, but this is very much depending on the structure of any single social security system. In our system, the pensionable age under the pay based scheme it is made flexible for women between 60 and 65 years, and this might help to fill the gaps in the contribution records of the claimants or to compensate the caring work carried out by women. The same goes for advantages as regards old age pensions in the contribution scheme for the purpose of child rearing. What should be repealed is the 2004 reform: the re-introduction of a different pensionable age for men and women coupled with the abolition of the flexible retirement is discriminatory for women.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

### **1-5. Distinction between statutory pensions schemes and occupational schemes.**

The distinction between statutory and occupational social security schemes is drawn by law. In particular, occupational pensions are intended to supplement benefits of the compulsory public insurance funds. Occupational funds can be set up by collective agreements, unilaterally by agreements among workers of the same professional category (or by employers whose employment relationship are not regulated through collective agreements) or by law.

The distinction between occupational and public funds is seems to be, in general, quite clear-cut and it is not likely that ECJ case law such as *Beune* and *Griesmar* will interfere with it.

However, in certain circumstances the picture is less clear, as the following example illustrates: Recently a provision was made of the automatic assignment to the schemes of the severance pay (*trattamento di fine rapporto*) for the purpose of contribution, unless the worker expressly demands the maintenance of the severance pay and therefore decides not to participate to the occupational scheme. To this end within the INPS (*Istituto nazionale previdenza sociale*), an occupational fund has been set up by law in order to gather the severance payments and the future contributions of workers employed in those sector where there are not yet occupational funds set up by collective agreements. This fund acts as a private occupational fund, according to the rules of occupational funds, despite the

fact that it has been set up by law. It is understood that also according to EC law it should be treated as occupational.

Furthermore, problems as regards the material scope of Directive 79/7 may eventually arise in the future in relation to special occupational funds which have been specifically authorized by law to replace public schemes for the workers involved (*fondi esonerativi ed esclusivi*: see for example Article 39 Act no. 486/1985) or to integrate statutory schemes (see Act no. 218/1990).

## **2. Percentage of population covered by the occupational schemes.**

Occupational funds in our country cover about 2,230,000 workers: 73 % of them are men (1,627,900 workers) and 27 % are women (602,100). A recent attempt at promoting occupational funds, however, has recently been made through the provision of the automatic assignment to the schemes of the severance pay (*trattamento di fine rapporto*) for the purpose of contribution, unless the worker expressly demands the maintenance of the severance pay and therefore decides not to participate to the occupational scheme.

## **3. Actuarial factors in occupational schemes.**

The occupational or supplementary pensions schemes are based upon insurance principles; they are run according to the criteria of capitalisation. These features may give rise to the following gaps in terms of social protection:

- if the higher life expectancy of women is taken into consideration, the women pension can be lower or their contribution rate higher than those provided for men; moreover, a higher contribution rate can discourage employees to take on women; until now, however, the occupational pensions funds have not taken this feature into account;
- the contribution record is impaired by earnings inferior to the average standards and irregular career; as the insurance principles are here rigorously applied, the pensions amount of atypical, intermittent, temporary, occasional and part time workers can be really low: indeed, given a fixed yield rate, the pensions amount varies according to the claimant's contribution record.
- as the contribution to the fund can also depend upon particular elements of the wage or be identified by means of complete payment to the fund of some of these pay elements, it could happen that wage elements are taken into consideration that are less favourable for women and this would in turn result in a lower pension for women than that provided for men
- the duration of the participation to the fund and the amount of the contributions paid in can influence the kind of investments granted by the fund to the claimant and in turn the average yield rate granted, which will be higher in relation to higher amount of contributions kept in the fund for longer periods: here again atypical, irregular workers will have the lowest treatment;
- as the complementary old-age pension is only allowed on attainment of the pensionable age established in the obligatory system which the individual belongs to with a minimum of 5 years insurance, in cases of irregular work it might be difficult for the claimant to fulfil the minim conditions within the same occupational fund: to this extent the recent provisions that have made easier the transferral of the worker position from an occupational fund to another are important.
- the discipline of the supplementary funds makes no provisions for the recovery of wasted contributions, thus the funds regulations are legitimate to omit provisions such as those on notional contributions or on redemption; in the instance of maternity, for example, many regulations provide for a reduced rate of notional contributions, i.e. only the contributions corresponding to the amount of the maternity allowance are credited;
- the funds are not obliged to provide survivors pensions;
- in case of death, the pension status of the worker may be redeemed by the spouse, by the children or, if living as dependents, by the parents, but nothing is provided for members of the *de facto* family.

The supplementary funds, therefore, tend to mirror the differences between workers existing in the labour market. The gaps in the protection provided by supplementary schemes are particularly worrying in the light of a social protection system in which public and supplementary schemes are seen as complementary to the end of maintaining adequate levels of welfare cover.

## **4. Prevailing funds**

All the occupational funds for workers under a contract of employment are defined contribution schemes.

### III. The three pillar system as a whole

#### 1-2. The three pillar system

The three pillar system is still a meaningful instrument to describe the different schemes. It manages indeed to emphasize the common characteristic of statutory, occupational and private schemes. The analyses of these leading characteristics, rather than of each single rule, makes clear if a form of protection helps in getting through the market segregation of women or increases it. Then, this instrument also helps to find out whether or not certain provisions are informed to the principle of gender equality.

In Italy all the reasoning around the structure of the social security system also wheels around a three pillar system: the first one, however, includes both the basic social security, which is yet quite weak and needs radical interventions, and social insurance; the second one refers to occupational schemes; and the last one to private insurance. Probably, the clue to a system inspired to gender equality - which also means a system geared to abolish the labour market segmentation existing between traditional and atypical employment patterns - is right on the kind of mix that is found among the 3 pillars.

### LATVIA

*Lîga Biksiniece*

#### I. Directive 79/7/EEC

##### a) General scope of the Directive

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

The social security system in Latvia is mostly based on the principle of **individual social insurance**. In the same time there exist also several **state social benefits** that are stated as concrete amounts guaranteed by the state.

There are following benefits and pensions in Latvia regarded to the scope of Article 3 (1) (b) of Directive 79/7/EEC.

**Sickness benefit** is granted in accordance with the law 'On Maternity and Sickness Insurance'.

An employee, a self - employed person, who has made social insurance contributions and a spouse of the self-employed person, who has voluntarily joined social insurance scheme are entitled to receive Sickness benefit.

**Old age pension** and **disability pension** is granted in accordance with the law 'On state pensions'. People residing in Latvia are entitled to **old age pension** if they have reached the retirement age stipulated by the law, if the insurance period of the person is not shorter than 10 years; Insured person residing in Latvia is entitled to receive **disability pension** if the person has not reached the retirement age determined by the law, has been acknowledged to be disabled (except the cases when disability has resulted from job accident or occupational disease after January 1 1997) and insurance period is not less than three years;

**Unemployment benefit** is granted in accordance with the law 'On Insurance Against Unemployment'. Person is entitled to receive the unemployment benefit, if the status of the unemployed person has been obtained; if the person is insured against unemployment; if the total social insurance record is not less than 1 year and social insurance contributions for this person before unemployment in Latvia have been made not less than for 9 months;

If insurance contributions prior to obtaining of the status of the unemployed person have been made for the period less than 9 months, but they have continued also after obtaining of the status, then the right to the benefit and the necessary 9 month contributions are determined for the period of the last 12 months before the day of applying for the benefit. The unemployed person also is entitled to the benefit, if during the last 12 months before the day of obtaining of the status of the unemployed contributions for the case of unemployment have not been made or have been made for less than 9 months, if the person has regained capacity for work after disability period or has taken care of a disabled child until the age of 16.

There are also **state social benefits** that are stated as concrete amounts and are paid regardless of whether the recipient is socially insured or not. The amount of those benefits is rather small.

Citizens of Latvia, non-citizens, aliens and stateless persons legally living in Latvia are entitled to receive **the state social security benefit** in following conditions:

- In case of disability or statutory age – those persons who have continuously lived in Latvia for the last 12 months before claiming the benefit, but in total – no less than 60 months;
- in the case of a loss of a breadwinner – those persons who have lost a breadwinner.

The benefit is granted in accordance with Article 13 of the law 'On State Social Benefits' to a person, who is not entitled to receive state pension (except pension for a disabled person in case of losing breadwinner) or insurance compensation in connection with a job accident or an occupational disease, if this person:

- is not an employee or a self-employed person under the law 'On State Social Insurance' and has exceeded the old age pension age by 5 years;
- has obtained the status of a disabled person and has exceeded 18 years of age;
- is still under age but has lost one or both parents and has not got married. State social security benefits for these persons are granted for the period until they come of age. The benefit will continue to be paid if the person after coming of age, continues studies in a general or vocational education establishment and is not older than 20, or is a student of the day department of a higher education establishment (full-time day department) and is not older than 24.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

Above mentioned schemes, except state social benefits, covers socially insured persons. In 2006 1,167.3 persons have been socially insured out of 2,280.1 inhabitants. 14.6 % of the population has received at least one of the benefits paid by the State Social Insurance Agency. There are data of number of payment and amount of each particular benefit provided on the website of State Social Insurance Agency (<http://www.vsaa.lv/vsaa/content/?lng=en&cat=651>).

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

Mostly people are excluded from the social insurance because of unregistered (unofficial) work performed. Unfortunately this phenomenon still exists in Latvia and it is common in such spheres of private sector as building, reconstruction, small enterprises etc. Also so called 'envelope salaries' (unofficial income without tax charging) in the private sector causes less amount of social pensions and benefits, because often taxes have been paid just from minimum wage and the rest to the person is paid unofficially.

*4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

There are few norms in the social legislation of Latvia creating indirect discrimination, incompatible with the directive 79/7/EEK. For instance, if a woman becomes unemployed 9 months after the maternity leave and has been working before the leave, the legislation denies the right to unemployment benefit. Respectively, since the duration of maternity leave is 4 months, women cannot make social contributions 9 months during last 12 months as the law requires for the receipt of unemployment benefit.

There is no gender difference in access to or in amounts of state **social benefits** that are stated as concrete amounts guaranteed by the state.

There is a practical problem with the social situation of persons performing unpaid work. They are excluded from the benefits based on social insurance. For example, women working in the market or as baby sitters, or doing other own small business often have not been registered as self-employed and do not pay taxes.

On one hand, every person can join a contributory social security scheme voluntarily. Such persons can choose the amount of social contributions to be paid to the social security scheme. On other hand, there are practical problems in with the full implementation and positive impact of legislation because these voluntary schemes are not widely used, especially in the rural areas.

Other problem is that mostly women work as medical personnel and social workers in medical or child care institutions where level of salaries is low. Consequently, the amount of the benefit is also low and makes gender differences in the amounts of the benefits.

#### 6. How could this situation be amended?

This is because legal systems nowadays are based to the individual approach and individual rights of the person. In order to provide equal opportunities there should be criteria and possibilities for each individual to apply to social security schemes regardless type of work he or she is doing.

There are serious steps taken by the State Revenue service and State Labour inspection in order to abolish unofficial work and unofficial income without tax charging. There should be more positive action and promotion done in order to motivate persons to join voluntary schemes.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?

The Social Security Act, being an 'umbrella law' in the social security system, incorporates the principle of gender equality and prohibition of discrimination regarding every regulation or administrative act, or situation in social security sphere.

In general, the family benefits and survivors pensions in Latvia do not have significant gender aspect and have been granted equally.

**The family state benefit** is granted to one of the child's parents or his guardian or the person who actually is bringing up the child and who is approved by the orphan court (parish court). Benefit is granted in accordance with the law 'On the state social benefits' and the amount of family state benefit depends on the total number of children in the family. There are also other family related benefits – child care benefit, guardianship benefit etc, - available for both parents.

#### **Survivor's pensions**

The following persons in Latvia are entitled to receive survivor's pension, if the deceased person has been a socially insured person:

- 1) children of the deceased person irrespective of the fact whether they had been supported by him/her;
- 2) family members incapable of work, that had been supported by the deceased person:
  - brothers, sisters, grandchildren, younger than 18, if they do not have parents capable of work;
  - brothers, sisters, grandchildren, they have become disabled before reaching the age of 18, if they do not have parents capable of work;

The **survivor's pension** is calculated on the basis of the potential old age pension of the deceased breadwinner. It is not widespread in Latvia to pay survivor's pension to the adult family members because each person has its own social insurance. Children are the ones who receive such pension in number of cases. In some cases this pension is significant support for all the family, including the widow.

2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.

Women and men who have reached the age of 62 and who have an insurance record not less than 10 years shall be entitled to the old age pension. The age of retirement still slightly differs for men and women because the transition period did not finish yet. The transition to the retirement age of 62 is carried out on step-by-step basis, i.e. by six month each year. Men have already reached this retirement age in 2003, and women will reach it in 2008. By 1 July 2006 the retirement age are 61 years for women – gradually increasing by six months every year until it reaches 62 years;

The salary gap makes difference in the amount of pensions depending on social insurance contributions. There is also the problem of single, lonely pensioners (mostly women) which pensions and income as such is below the subsistence level. On the other hand, pensioners both men and women have low income and suffer from social exclusion in Latvia. The state average wages are increasing more rapidly than pensions and the increase of pensions is mainly based on the changes in the consumer price index. The state concentrates to the improvement of social situation of old people, irrespective their gender because the gender differences are not significant.

3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?

4. Should these exclusions in your opinion be repealed? Please specify, which and why.

No direct exclusions or different treatment based on gender have been observed.

## II. Directive 86/378/EEC as amended by Directive 96/97/EC

1. *Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

The system of social security in Latvia is based mainly on the principle of individual social insurance. That means that the amount of pensions as well as sickness benefit, unemployment benefit, maternity benefit, paternity benefit and childcare benefit is proportionate to the individual social contributions made. These payments come from special social insurance state budget. State social benefits like the childbirth benefit, the family benefit, benefits to guardians supporting a child, etc. are stated as concrete amounts guaranteed by the state. These benefits are paid from the state basic budget and regardless of whether the recipient is employed or not.

The pension system is developed as social insurance system based on personal interest of each person in securing his or her old age. The pension reform is completed in legislative stage. **3 pension system levels** have been introduced according to the law 'On State Pensions'. According to the concept of pension reform of 1995, the pension system consists of three levels:

1. level – compulsory state non-funded pension scheme (principle of generation solidarity);
2. level – state funded pension scheme;
3. level – private voluntary pension scheme.

2. *What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

According to information of State Social Insurance agency, 1,167.3 persons<sup>53</sup> have been socially insured out of 2,280.1 inhabitants in 2006. Number of these persons slightly increases each year. In 2006 in average 475,000 persons have received old age pension each month, 68,000 persons – disability pension, and 24,000 – survivor's pension.

3. *To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Article 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

4. *Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

The contributions made by employees and employers in the state social security budget are the same for men and women. The defined-contribution-schemes are most common in Latvia comparing to defined-benefit schemes. Several factors make difference in final amounts paid as pensions of benefits:

- the gender based differences in salaries influence the amount of pensions and social benefits based on social insurance;
- possible gaps in social insurance periods (for example state makes social contributions for persons taking care for the child for the period of one year. If persons want to take care at home longer than one year, they are reluctant to join social security schemes voluntarily).
- different outcome of pension calculation. The old-age pension shall be calculated on the basis of the following formula:  $P = K/G$ , where 'K' is the insured person's pension capital, which is formed by the amount of insurance contributions registered in such person's account and the annual capital gains. 'G' is the time period (in years) in respect of which from the year of granting the old-age pension, the payments of the old-age pension are planned. In practice that means that formula involves different G-index for men and women based on different life expectance. This index is regularly stated by the Cabinet of Ministers, on the basis of data of the State Statistics Committee and calculations by the Ministry of Welfare.

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<sup>53</sup> Information of State Social Insurance Agency, <http://www.vsaa.lv/vsaa/content/?lng=en&cat=651>.

5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?

The pension age for women and men has been equalised. Nowadays it is the age of 62 years instead of previous 55 for women and 60 for men. The age of retirement still slightly differs for men and women because the transition period did not finish yet. The transition to the retirement age of 62 is carried out on step-by-step basis, i.e. by six month each year.

No direct gender-differentiated approach is adjusted in the social security system. The equal treatment in principle is implemented in the social insurance system, but the gender based differences in salaries make difference in the amount of social benefits depending on social insurance. Differences in the social contributions and in the life expectancy subject women to greater poverty risk at old age.

## LIECHTENSTEIN

Nicole Mathé

### I. Directive 79/7/EEC

#### a) General scope of the Directive

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

The first pillar is considered to consist of the obligatory sickness insurance (*Krankenversicherung, KVG*)<sup>54</sup>, the invalidity scheme (*Invalidenversicherung, IVG*)<sup>55</sup>, the old age scheme (*Alters- und Hinterlassenenversicherung, AHVG*)<sup>56</sup>, the accidents at work and occupational diseases scheme called obligatory accidents insurance (*Unfallversicherung, UVersG*)<sup>57</sup> and the unemployment insurance (*Arbeitslosenversicherung, ALVG*)<sup>58</sup>.

The benefit during maternity is paid by the sickness insurance if the woman was at least 270 days insured before the birth of the child. Accidents not at work are also covered by the obligatory accidents insurance if the person works more than eight hours per week for the employer. Generally accidents are included with the sickness insurance if the person is not employed.

The social assistance scheme supplements the schemes mentioned above if a person has less income than the so called minimum living wage.

In that case social assistance regulated by specific legislation (*Sozialhilfegesetz*)<sup>59</sup> is given by the state to the person in order to help him or her to pay the necessary insurance premiums and costs for living.

2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?

All of the above mentioned schemes are covered by the scope of Directive 79/7/EEC. In general all employees are covered by these schemes. In Liechtenstein the working population consists of 41 % women and 59 % men.<sup>60</sup>

<sup>54</sup> LGBl. 2006 no. 224, last update.

<sup>55</sup> LGBl. 2006 no. 244, last update.

<sup>56</sup> LGBl. 2006 no. 245, last update.

<sup>57</sup> LGBl. 2006 no. 89, last update.

<sup>58</sup> LGBl. 2006 no. 155, last update.

<sup>59</sup> LGBl. 2007 no. 50, last update.

<sup>60</sup> According to the average of data collected during the period of 2001 to 2004, in 'Women and men in Liechtenstein. Facts and figures' published by the staff position for equal chances, 2006.

The obligatory sickness insurance (Article 7 KVG) is mandatory for everybody domiciled in Liechtenstein, which means that practically the whole population is covered for sick-nursing. For sick-benefit (Article 7 KVG) only employees over the age of 15 years who are working more than eight hours per week or have an employment contract that is lasting more than three months have to be insured by the employer. Other persons like self-employed, unemployed or family managers can insure themselves for sick-benefit on a voluntary basis, it is not compulsory by law.

Invalidity and old age insurance is obligatory for every person domiciled in Liechtenstein (Article 34 AHVG, Article 26 IVG). Invalidity-, old age-, accidents at work-, and occupational diseases-schemes comprise all employees (Article 34 AHVG, Article 26 IVG, Article 1 UVersG). Persons without occupational activities are naturally not included in accidents and occupational diseases-schemes, but they are insured against accidents by the obligatory sickness insurance (Article 12 KVG). Self-employed are not obliged to insure themselves against accidents at work and occupational diseases, but they can insure themselves on a voluntary basis (Article 4 UVersG).

In conclusion every person domiciled in Liechtenstein is insured on a compulsory basis against sickness-nursing, accidents, invalidity and old-age. Employees are in addition to that insured against accidents at work and occupational diseases as well as unemployment.

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

People are not automatically included in certain insurance schemes (e.g. sick-benefit, Article 7 KVG) if they are i.e. working very few weekly hours or in a short period of employment, but they can insure themselves against the risks in question on a voluntary basis. The disadvantage is however that they have to pay all the cost for premiums themselves and the employer is not participating.

To sum up the employee is privileged compared to persons without occupational activity because a full time job will bring the highest premiums and a better coverage in the end. A person working on a non-remunerated basis who will only pay the minimum premiums has to pay them alone that means without participation of the employer.

*4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

Women are not generally excluded from benefits because they are free to insure themselves on a voluntary basis or the insurance is anyway mandatory for everyone domiciled in Liechtenstein. The disadvantage is definitely the fact that they have to pay their premiums themselves if they are employed for less than eight weekly hours or in a short period of employment less than three months. The fact that more women than men reduce their occupational activity in order to dedicate time for family work creates an imbalance between men and women. Consequently more men stay at work as employees and profit from compulsory insurance schemes where employers have to participate with the costs of premiums. So women are not insured to the same extent as men and that concerns all of the existing benefits because all the insurance schemes are linked with occupational activity as an employee. If a person is employed during the whole life he or she will normally have a good coverage in all insurance schemes. The imbalance lies in the different course of male and female carriers. A male carrier will not have many breaks and therefore a man will finally profit from a better coverage. The insurance schemes tie up to continuous employment cycles during life time and therefore prefer men. Nevertheless men profit twice because they are allowed to stay employed and insured but do not miss family life organised by women. However women loose twice with this system because they reduce their occupational activity and therefore have less coverage by the insurance schemes. But the workload for women continues to exist because they manage their families without remuneration and without participating in insurance schemes.

*6. How could this situation be amended?*

Firstly, as long as the existing insurance schemes have not yet changed women shall (or shall be encouraged to) only reduce their occupational activity in order to dedicate time for non remunerated family work if they are sure that the other partner of a couple overtakes the costs of premiums for the missing part of the coverage in insurance schemes. In fact this is even fair because the family manager contributes with the family work to the family income. Otherwise the partner could not follow the occupational carrier without breaks.

Secondly, the strict link between employment and insurance schemes shall disappear. Life cycles are changing and people are not working anymore their whole life for the same employer.



Time-outs are taken by both, men and women for different reasons, i.e. children, formation, stress release, longer period until retirement etc. But the necessity to have a good coverage during life time by insurance schemes is still there. Consequently the connecting factor of insurance schemes shall be adapted to reality without gender discrimination due to still existing stereotypes. Therefore the insurance could be fixed at the person and not exclusively at the employment relationship.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Following existing stereotypes mostly women profit of family and survivors' benefits. But Liechtenstein's legislation has been changed in order to eliminate gender discrimination as far as possible. In general spouses of both sexes are treated equally.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

In this field gender equality went very far yet. Since 2001 the determination of the pensionable age is equal between men and women at 64 years (Article 55 AHVG). Pensions for widows and widowers are foreseen in the law (Article 57 and 58 AHVG) and equal for both. Advantages for parents who dedicated time for the education of their children are equally divided between them. They profit from so called '*Erziehungsgutschriften*', a fictitious income is added at the calculation of the pension for the period dedicated to family work. With regard to the main points no gender discriminating provisions can be figured out. It is to add that only for a transitional generation (male spouses born in 1944 and earlier) an additional pension for the female spouse will be paid by the AHV if the wife is born in 1954 or earlier.

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

The effect of these exclusions is to allow for the continuation of still existing stereotypes in reality. If the family work is still made by a majority of women they shall also profit from certain advantages to compensate their dedication to non-remunerated work. On the other hand this system consolidates the stereotypes and renders mostly women dependent from men. Women are seemingly secured but not on a personalized basis, women have not created their own rights for their benefits but they derive from men's rights.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

In my opinion these exclusions were introduced to take into account that women overtake non-remunerated family work and they shall get compensation for that, because of the fact that they have not participated as employees on the labour market in the same way as men did. These exclusions base on traditional stereotypes. Article 7 (2) of the Directive 79/7/EEC itself prescribes to examine periodically if such exclusions are to be maintained in consideration of the social development in this field. Since 1978 when the directive was made, society has changed a lot. Bearing in mind that much has been undertaken to change the stereotypes of women and men in society it would be coherent to adapt also Directive 79/7/EEC. The exclusions shall be repealed categorised as exclusions, but the substance of these exclusions shall reappear as gender neutral provisions. Such provisions could prescribe that periods during life-time dedicated to non-remunerated work i.e. family work, formation, social work, time invested in personal development etc. have to be taken into account positively for every person in order to profit from coverage by insurances.

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

Generally it is possible to distinguish between statutory and occupational pension schemes because different laws govern the topics. In Liechtenstein a specific law provides for occupational schemes (*Gesetz über die betriebliche Personalvorsorge, BPVG<sup>61</sup> and its regulation BPVV*) and cover benefits for old age, invalidity and death.

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<sup>61</sup> LGBl. 2007 no. 13, last update.

2. *What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

In Liechtenstein the working population consists of 41 % women and 59 % men. These figures show that less women than men are profiting from occupational schemes.

3. *To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

The law governing the occupational pension's system leads to the assumption that actuarial factors are indeed used when calculating the pension. Article 5 BPVV prescribes that at the moment of reaching the pension age the capital has to be transformed into a lifelong pension according to accepted technical bases. More technical details shall be contained in the rules of each insurance company.

4. *Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

The tendency to a defined-contribution-scheme is prevailing as Article 5 BPVV prescribes that only at the moment of reaching the pension age the capital has to be transformed into a lifelong pension according to accepted technical bases. Before that date only the percentage of the salaries for the contributions are defined by Article 7 BPVG.

5. *Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

For Member States that became Member of the EEE only after May 1990 retroactivity goes also back to a later date. Liechtenstein that became Member as of 1 May 1995 the date for retroactive effect is in 1998. Directive 96/97/EC was overtaken by Liechtenstein via the decision of the EEE-Committee and entered into force on 6 March 1998. The law concerning pensions of civil servants (*Gesetz über die Pensionsversicherung des Staatspersonals*)<sup>62</sup> provides for in Article 29 the pensionable age of 64 years for men and women. This article was already introduced in the year 1998.<sup>63</sup>

### **III. The three pillar system as a whole**

1. *Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

For Liechtenstein the three pillars system is still a meaningful instrument to describe the schemes while it actually exists there.

2. *Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

It is a hindrance if the pillar-based approach fixes the coverage by insurance mainly at remunerated working relationships.

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<sup>62</sup> LGBl. 2001 no. 173, last update.

<sup>63</sup> LGBl. 1998 no. 78.

This consolidates stereotypes of men and women in society because men will not overtake non-remunerated work to the same extent as women if they lose coverage by insurance schemes.

It can be conducive to gender equality – whatever the insurance system is called – if it considers gender sensitive problems.

## LITHUANIA

*Tomas Davulis*

### I. Directive 79/7/EEC

#### a) General scope of the Directive

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

The Law on the Principles of State Social Security System (published in official publication State Gazette, 1990, no. 32-761) legislates the principles of State Social Security. Lithuanian social security system is based on two main parts of the system. Lithuanian social security system consists of: a) State Social Insurance system and b) social assistance and social support from general State funds (general taxes). The Law sets that other public and private systems of social security, the functions of which shall be regulated by laws on the activities of such organizations and enterprises may coexist with State social security system in the Lithuania.

Sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-schemes in large part are covered by State Social Insurance system (together with survivors and maternity – paternity schemes). Thus, benefits which are to be considered as of statutory schemes and being part of the first pillar targeted by Directive 79/7/EEC contain:

- sickness benefits;
- invalidity pensions;
- old-age pensions;
- benefits in case of accidents at work and occupational diseases;
- unemployment benefits.

There are certain categories of state social assistance benefits that can be regarded as supplementing or replacing aforementioned schemes for invalidity and old-age pensions (Article 3 (1) (b) of Directive 79/7/EEC). Such social assistance benefits are paid for the persons to whom the state assistance is provided because of their disabilities, age or other reasons (usually periods of nursing disabled persons) and who can not be awarded similar social insurance pensions because of objective reasons. These social assistance benefits are paid exclusively from State's budget and do not depend on any social insurance periods or previous incomes. Categories of social assistance benefits: social assistance pension, target compensations for nursing, relief compensations.

For the clarity of the following, specific system of pensions in Lithuania should be described in order to present its particularities. As it was already mentioned, social insurance pensions are the primary and most widely covering system. This system can be attributed to statutory, first pillar schemes. Moreover, state social insurance pensions scheme is the only one compulsory scheme for employed and self-employed persons and is based on the pay-as-you-go principle. Though it has some elements which are characteristic to second pillar (occupational) pensions – length of social insurance which is very closely linked to employment (self-employment) periods and level of former incomes. Social insurance pensions consists of two parts: a) a basic part that is of the same amount to all pensioners who acquired the required social insurance period (30 years); The purpose of this basic part is to guarantee minimal living standards of pensioners; b) a supplementary part which depends on total insurance period and former incomes of person. The purpose of this supplementary part of the pension is to preserve adequate level of incomes.

The second element of Lithuanian pension system is the funded (cumulated) pension scheme. This scheme allows cumulating a portion of social insurance contribution in private pension funds. Participation in this scheme is voluntary, that means employed person may decide whether to join this system or not. Employer does not play any role in this system. Under adoption of related legislation this scheme was entitled as 'second level' pensions. Nevertheless it should be noted that this scheme is not adequate to second pillars (occupational pensions), but rather to the third pillar pensions.

The third element of Lithuanian pension system presented at the latest, in July 2006, is occupational pension scheme (Directive 86/378/EEC as amended by 96/97/EC).

Besides aforementioned pensions schemes (social insurance pensions, funded pensions and occupational pension; in certain extend they all are related to periods and amounts of contributions paid), there are system of so called State pensions. These pensions are awarded to certain categories of state servants (pensions for officers and soldiers), scientists and judges. Although the right to these pensions are related to old-age and (or) invalidity and depends on required periods (i.e. period of military or police service, period of employment as scientist, period of carrying position as judge) and in some cases on amount of previous incomes, the initial purpose of these pension is to compensate and to return for the activities which is of exclusive importance to the State's life. It should be noted that the scheme of State pensions is applied together with the scheme of social insurance pensions, that means, these categories of persons enjoy double coverage.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

All employed (salaried) workers are covered by all schemes mentioned in previous section. Self employed persons are covered only by invalidity and old-age pension.

The table presented above contains statistics of the population engaged as employed and self-employed persons (according information of the Department of Statistics).

	2006 (thousand)
Total population	3403.3
Total engaged	1499.0
Self-employed	199.8 (6 %)
Males	123.1
Females	76.6
Employed	1263.7 (37 %)
Males	622.7
Females	641.0
Contributing family workers	35.5 (1 %)
Males	10.0
Females	25.5

It should be noted that contributing family members do not fall under coverage of any abovementioned benefits by reason of the fact that they do not have official status as employed or self-employed persons. Because of the fact that the greatest part of contributing family members are women, they remains uncovered by social security system more often than men.

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

The right to social security is acknowledged for all people in Lithuania irrespective of their gender. The social security system concerned is funded through contributions by employers and employees and does not differentiate right and obligations within this system on any grounds, including gender. The contributions are calculated as a percentage of the salary paid to employee.

All employed persons have to participate in state social insurance scheme, not excepting part-time work, irrespectively of wage level, etc. Self-employed persons, participating only in pension social insurance may choose to pay contributions from the total amount of their incomes or only from the portion of their incomes.

Exclusion from the social insurance schemes is possible in such a case when person does not have required social insurance period (minimal period is 15 years and grants only the right to receive basic part of the pension; necessary period is 30 years and grant the right to both parts of pension). Thus person who was paying contributions only for 10 years will not be able to receive social insurance pension.

*4. In which areas and to what extent especially women are excluded from benefits, from access to the schemes or from more generous benefits?*

Firstly, situation of contributing family members must be noted. As it was mentioned in section 2, contributing family members are not covered with mandatory social insurance. As women compose the greatest part of this category, they may face difficulties acquiring rights to social insurance benefits.

Secondly, women have more 'non-active' periods, i.e. child raising periods. Notwithstanding the fact that some child raising periods (until child reaches three years old) are taken into account, these periods have less value (contributions are compensated by the state but they are minimal) and thus result in lower pensions.

As state social insurance benefits are related to the wage of person, women are awarded with lower benefits because wage differences between men and women still exist (according data in 2005, there was more than 17 percent difference).

*6. How could this situation be amended?*

Situations that are given in section 5 allows to present an assumption that different position of men and women is influenced not by certain lacks in legislation but rather by situation in labour market and by traditional and cultural attitudes towards family responsibilities and working activity.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Survivors' pensions are the part of state social insurance system, accordingly, the situation described in part a) covers these pensions. It should be noted that survivors' pensions (widowers' and widows') are of the same amount for all beneficiaries. This leads to equal position of men and women concerning survivors' pensions.

Family benefits can be divided into two schemes. Maternity and paternity benefits belong to state social insurance scheme. Maternity and paternity insurance covers only employed persons, thus persons engaged in other activities can not apply for these benefits (still there is a possibility for them to insure themselves on voluntary basis).

Another part of family benefits – benefits for children – is a part of state social assistance scheme. These benefits are of general nature, financed by general taxes and are not related to employment or contributions. These benefits can be provided for both father and mother or other person who is actually raising the child.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

In Lithuania the pensionable age for men and women is different: 60 years for women and 62 years and 6 month for men. This difference is traditional for Lithuanian social security system, though at this moment this difference is declined from 5 years to 2 years and a half.

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

On the one hand the smaller pensionable age for women can lead to some disadvantage. The amount of state social insurance pension is related to working periods of persons. Women having pensionable age smaller, may leave labour market earlier but with shorter insurance periods. This may lead to lower pensions. It must be admitted that Lithuanian pensions still do not reach eligible amount comparing to persons former wage.

On the other hand aforementioned negative aspect is not so topical, because under Lithuanian legislation person is absolutely free to choose whether to leave labour market after reaching pensionable age. Person who is awarded his pension may continue to work and receive double incomes – his pension and wage. In this case women's position may be regarded more advantageous.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

The difference in pensionable age has very important aspect: the lower pensionable age for women can be treated as privilege related to physiological characteristics of women. As long as persons have the choice whether to leave labour market after reaching pensionable age or not, this exclusion should be considered as fully reasonable.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

The description of Lithuanian pensions schemes provided in part a) reveals that it is impossible to distinguish statutory pension scheme and occupational scheme. Statutory pension scheme – social insurance pensions – are also related to pay and employment relations, though they must be regarded as falling under scope of the Directive 79/7/EEC. While occupational pensions targeted by Directive 86/378/EEC as amended by Directive 96/97/EC were presented in Lithuania only in July 2006.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

As the Law on occupational pensions was adopted only in 2006, there are no statistical data concerning this scheme coverage or information on practical implementation of this scheme. Nevertheless, some predictions may be given at the moment. Considering the fact that social insurance pensions scheme covers entire economically active population it is not expected that participation in occupational pension's scheme will be significant at least in the nearest future. Another reason is still low level of social dialogue and collective agreements in Lithuania. As implementation of occupational pension's scheme in practise requires a close dialogue between employer and his employees, lack of social dialogue in Lithuanian enterprises will be a serious obstacle for occupational pension's scheme.

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

The Lithuanian legal backgrounds of occupational pension's scheme establish defined-contribution-schemes as prevailing.

*5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

No measures were taken in Lithuania.

## **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

Lithuanian example shows that the three pillar system is not sufficient to describe the different schemes in the Member States. Nevertheless this system should not be withdrawn as it allows creating and improving pension's schemes at EU level as well as national level.

2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?

The three pillar-based approach gives a possibility to reflect specific clauses of gender equality in different pension's system. Every pension's scheme has its own peculiarities of gender equality.

However, such an approach may be criticized due to the fact that it does not allow seeing an integral view of gender equality principles within social security system. Besides, measures that are taken to promote gender equality in social security system may lack closer relation with those designed to implement gender equality in labour market. There is no doubt that national legislation prevents any unequal direct or indirect treatment. In practise, most cases of unequal treatment in social security sphere can be related to the different position of men and women in working life (horizontal and vertical segregation of jobs, differences in wages, family responsibilities) and traditional attitudes of women's role in private and public life. This aspect should be emphasized when modernizing provisions of gender equality in social security system.

## LUXEMBOURG

Viviane Ecker

### a) General scope of the Directive

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

The social security system in Luxembourg is compulsory and covers all persons in paid employment in the country. It covers the following categories of benefits: sickness and maternity, pensions (invalidity, old-age and survivor's pensions), insurance against accidents at work and occupational diseases, unemployment benefits, and family allowances. The social security system also provides for dependant's insurance and guaranteed minimum income.

Although there are different schemes for the public and for the private sector, benefits are converging.

The law of 15 December 1986<sup>64</sup> transposing Directive 79/7/EEC, implements the principle of equal treatment for men and women to all statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work and occupational diseases and unemployment as well as to social assistance as far as it is intended to supplement or replace the schemes referred to above (Article 1).

2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?

The number of active insurance contributors has been estimated at 296,344 persons in 2002, 188,319 residents and 108,025 non residents, among them 185,103 men and 111,241 women.

They are covered for all the benefits listed above.

Sickness and maternity: a very high rate of persons is covered. In 2003 the annual average rate was 96.3 % of the residents covered by statutory schemes, while 3.6 % of the population (mainly civil servants of the European institutions) were covered by private insurances. The total cover is estimated at 99.9 %.

According to the figures of 2005, persons covered by

- sickness, maternity as well as dependant's assurance:

607.900 protected persons, among them 444.800 residents, 221.500 me and 223.300 women

- pension: 296.059 covered persons, 181.874 men and 114.185 women, among residents: 99.221 men and 74.496 women.

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<sup>64</sup> Loi du 15 décembre 1986 relative à la mise en œuvre progressive du principe de l'égalité de traitement entre hommes et femmes en matière de sécurité sociale et portant modification de certaines dispositions légales en matière de législation sociale, *Mémorial A*, 1986, p. 2343.

3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment) ?

Working time of less than 64 hours a month did not generate pension right before a Law of 6 April 1999 made several amendments to the general pension insurance system.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?

Yes. The principle of gender equality has also been extended to these benefits.

2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.

No.

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?

It seems that very often occupational schemes are conceived and/or regulated in such a manner that they become very close to the statutory pension schemes.

2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?

In Luxembourg the second pillar occupational pension system has developed only since 1999. As the benefits provided under the first pillar are quite generous, the occupational pension system is perhaps less developed than in other countries.

It developed especially in the industrial and commercial companies of foreign origin or important size, like in the banking environment. According to the IGSS (*Inspection générale de la Sécurité Sociale*), there is, till now, a lack of statistics in this field. The IGSS is planning a survey for next year.

3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Article 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).

As far as I could find out actuarial factors seem to be used in the defined-benefit schemes.

4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?

The defined- contribution scheme becomes predominant.

5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?

No.



### III. The three pillar system as a whole

1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?

Yes, it is commonly referred to.

2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?

I don't feel competent to answer this question.

### MALTA

Peter G. Xuereb

#### I Directive 79/7/EEC

##### (a) General Scope of the Directive

##### 1. Benefits as part of the statutory scheme that fall within the scope of the Directive.

The Social Security Act (Chapter 318 of the Laws of Malta) is deemed to cover all the risks listed in Article 3 of the Directive i.e.

- Sickness – sickness benefits
- Invalidity – invalidity pension, increased invalidity pension, national minimum invalidity pension
- Retirement Pension – two-thirds pension, retirement pension, increased retirement pension, national minimum pension, increased national minimum pension, decreased national minimum pension, survivor's pension (derived right), widow/er pension
- Accidents at work and occupational diseases – injury benefit, injury pension, injury gratuity
- Unemployment – unemployment benefit

(ii) Social assistance in so far as intended to supplement or replace the schemes referred to in (i), old age pension (non-contributory)

(iii) Family benefits granted by way of increases of benefits due in respect of the risks referred to in (i).

These include children's allowance, disabled children's allowance, orphan's allowance, supplementary orphan's allowance.

##### 2. Percentage of the population covered by each scheme

Note: The entire population is of course 'covered' by these schemes. As to the proportion of the population actually on benefit, it seems that percentage figures are not available. Further, it appears that the last figures available are in terms of the number of beneficiaries and are given below. Source: Social Protection in Malta, national Statistics Office, Malta, for the period 1998 – 2002, (table 11) published in 2004. The figures are for 31 December 2002 (see <http://www.nso.gov.mt>). Population size: ca. 390,000.

Invalidity pensions:	7,560
Widowhood Pensions:	13,762
Old Age Pensions:	4,224
Disability Pensions:	1,956
Supplementary assistance:	29,274
Social assistance:	14,209
Sickness assistance:	14,467
Retirement pensions:	35,983
Accidents at work and occupational diseases:	not given
Unemployment:	not given
Children's allowance:	37,141
Disabled child allowance:	597

##### 3. Main reasons for exclusion

The main reason is that they may not have paid in the minimum number of contributions according to each type of benefit (where this is contribution based). This is often because they are not registered for employment and therefore do not pay these contributions as employees.

Also part-time employees i.e. those employed for less than 20 hours per week fall outside the net. The crucial factor is the number of contributions made. Another reason is that many women work in the family business, as assisting spouses in many cases, and this goes unrecognized as it is not official employment.

#### **4. Women and exclusion**

In the main, women find themselves excluded because they tend to work part-time. This will be either because they work in the black economy or because they are employed as part-time employees for less than 20 hours per week. The other main reason is that it is clear that many women assist in the family business on an unofficial basis. While they may benefit from derived rights, it is not easy to study the above-mentioned 'under the counter' phenomenon or to find a remedy such that they would be ensured of own rights in the absence of transparency. In a 2003 report produced by the then department for Women in Society in the then Ministry for Social Policy<sup>65</sup>, a survey showed that a significant number of women claimed they did not work in the formal labour market because working would threaten alternative sources of income (alimony/old age or widow's pension/early retirement scheme) as well as that the income tax/social security scheme is too burdensome and so discourages the pursuit of additional income. A Research Project covering all aspects of social security legislation from the gender perspective has been commenced by the National Commission for the Promotion of Equality (the NCPE), which is the national Equality Body set up by the Equality for Men and Women Act (Chapter 456 of the Laws of Malta). I am informed that the report should be completed by the end of the year. In September 2006, the Ministry for the Family and Social Solidarity together with the Ministry of Health, the Elderly and Community Care launched a consultation exercise on the National Report on Strategies for Social Protection and Social Inclusion 2006 - 2008 (available on website of the Ministry for the Family etc. on <http://www.mfss.gov.mt/services>) in August of 2006, with a deadline for submissions of 8th September 2006. The National Report (p. 31) envisaged the introduction of, and the Social Security (Amendment) Act of 2006 provides the Minister with powers to introduce, the 'second mandatory occupational pension' and the voluntary third pension option of private pension schemes, with the possible introduction of tax incentives to promote the accumulation of pension funds, in due course. It seems there are very few occupational pension schemes in Malta. In some cases, benefits (e.g. sickness assistance) are payable to the 'head of household' but this would not seem to be operating in a discriminatory way in practice, although there is some potential for bias and a watchful eye must be kept. At other times the Social Security Act speaks of 'a husband maintaining his wife' and then 'other persons' (e.g. invalidity pension); therefore, there is certainly scope for revision of the law to provide for greater legal certainty. The entire law is under review by a government Social Security Law Review Group, with a brief also to re-examine the 'insurance' basis of the legislation.

#### **5. Amending the Situation**

One section of the National Strategy Document referred to above (Part Three) deals with the National Strategy Report for Pensions. It is clear that the strategy envisages the making of a clearer link between contributions and benefits, and that a life-cycle approach is being taken while seeking to reconcile that with non-contributory credits and gender issues. We await the outcome of the consultation exercise of the Ministry of the Family and Social Solidarity as well as that of the research undertaken by the NCPE. It is also clear that something must be done about the threshold of 20 hours per week for part-time employees. There is evidence that this is often abused by employers who will employ persons for 19 hours per week in order to avoid the possibility of obligations arising under the social security and employment legislation, and thus the accrual of entitlement to benefits by such employees. Women make up the larger part of persons employed as part-time employees. It would also make a difference if provision were made in the law as to family breakdown. It was also mentioned in the National Report that a proposal would be advanced to extend contributory credits to the situation of parents caring for children (Report, page 39).

It is to be noted that some amendment has been made of the Social Security Act (Chapter 318 of the Laws of Malta). This was by the Social Security (Amendment) Act of 2006 (Act No. XIX of 2006). The main purpose of this amendment was to equalize the retirement age for men and women and gradually raise the retirement age to 65.

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<sup>65</sup> Factors Affecting Women's Formal Participation in the Labour Market: Results of Research Project, produced by the Workers' Participation Development Centre, University of Malta, 2003.

**(b) The exclusions mentioned in Article 3(2) and in Article 7(1) of Directive 79/7/EEC**

Article 3(2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, the general principle of equality would seem to apply here, and the official position as related to me by the Department of social welfare standards is that the Social Security Act secures this. On the other hand, the NCPE has said that it will examine the situation on this point.

In general, Maltese law has in the past not addressed the matters referred to in Article 7 (1), i.e. in general the exclusions existed. However, the government has declared its intention to abide by its obligation under Article 7 (2) to periodically examine the matters included in Article 7(1). Indeed it has addressed the issue of different retirement ages for men and women in the recent amendments to the Social Security Act as regards pensions. The National Report of 2006 had covered the relevant schemes and provisions in general terms. The key objective was that people might work longer in view of demographic changes that have made the current pension scheme unsustainable, at the same time addressing the low female employment participation rate. The statutory scheme has therefore been amended by the Social Security (Amendment) Act of 2006 to provide for equal retirement ages and the gradual (phased in) increase in the retirement age to 65 for both men and women. Previously women would retire at 60 while men would reach retirement age at 61. The new retirement age of 65 applies to all who were aged 45 or less on 1 January 2007. Those who on that date were 55 years of age or over are not affected. Working women in that age group will be able to retire at 61 (by option), rather than at 60.

The above means that women are now brought on a par with men as far as retirement age is concerned. A recent change brought men on to a par with women as to the 'social assistance allowance (female)' (as it was called) - a form of assistance for the care of an elderly dependant that was previously only available to women.

It has not been possible to conduct a detailed empirical study for the purposes of this exercise. However, the Social Security Act was based on the male breadwinner model and although we have seen amendments a full review is being undertaken. Indeed, this is the principal reason why a study has been commissioned by the Ministry and is being conducted by the NCPE. This study will include a full review of the entire raft of Social Security legislation, an extremely complicated body of law, the application of which is not always immediately obvious from the text. In the view of many, these exclusions have outlived their usefulness and should be repealed. If maintained, they may lead to discrimination against those persons, mostly women, whose employment status is often adversely affected by certain rather outmoded social expectations of women as wives and mothers including dependency on the husband and obligations as a 'main care-giver'. There have been clear 'social developments' in Europe as a whole and also in Malta, related not least to demographic change, as well as the effects of economic change, that militate against the retention in general of a male-breadwinner model. No doubt this is the thinking behind the review currently being undertaken by the Maltese Ministry for the Family and Social Solidarity in conjunction with other ministries, and the reason for the research being undertaken by the NCPE. The evolving thinking in Malta is that women should have a real choice as to whether to work or to bring up a family or do both, and the logic is that women should not be deprived of needed benefits for not having been employed or continued in employment, inasmuch as their work in the family home also has an economic value that should be recognized. It is not clear yet how this can be translated into the granting of benefits without the payment of contributions, but the first steps have been taken in providing for the extension of contributory credits to the situation of parents caring for children. This has been done as part of drive to get women back to work.

**II Directive 86/378/EEC as amended by Directive 96/97/EC**

1. It can be said that it should always be possible to distinguish between the statutory pension scheme and the occupational schemes. There are very few occupational schemes in Malta. Most were effectively abolished in 1979. The proposed 'second pension' will itself be a mandatory statutory scheme. In Malta, Directive 86/378/EEC as amended was implemented by Legal Notice 317 of 2005, which brought in the Equal Treatment in Occupational Security Schemes Regulations, enacted under the powers given by the Social Security Act (Chapter 318 of the Laws of Malta).
2. Regretfully, there do not seem to be recent official statistics in the format required in the question. However, as was said above, the number of occupational schemes is very limited in Malta, and the proposed 'second pension' will be mandatory.

3. Legal Notice 317 of 2005 prohibits all discriminatory treatment. Articles 3 and 4 of the Regulations define discriminatory treatment in the same terms as set out in Article 6 of the Directive. Regulation 4 (1) prohibits, and in § (2) lists non-exhaustively, provisions contrary to the principle of equal treatment which shall accordingly be considered null and void. As far as transposition of Article 6 (1) (h) of the Directive is concerned, Regulation 4 (2) (h) renders null and void clauses in law, contract or agreements that 'set different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined contribution schemes: provided that in the case of funded defined-benefit schemes, *certain elements including*: (i) the conversion into a capital sum of part of a periodic pension; (ii) the transfer of pension rights; (iii) a revisionary pension payable to a dependant in return for the surrender of part of a pension; (iv) a reduced pension where the worker opts to take early retirement; may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex, at the time when the scheme's funding is implemented.' As far as transposition of Article 6 (1) (i) of the Directive is concerned, the setting of different levels of *worker* contribution is prohibited by Regulation 4 (2) (i) without further elaboration, and not utilizing the possible qualifications permitted by Article 6 (1) (i) of the Directive. Then Regulation 4 (2) contains a paragraph '(j)' that prohibits the setting of different levels for *employers'* contributions, but in *this case excepts* (i) the case of defined-contribution schemes if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes; and (ii) the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined. That is, the qualifications permitted by the Directive in relation to the *worker's* contribution are sought to be utilized by the Maltese Legal Notice in relation to the *employer's* contribution.
4. The statutory scheme, which covers the entire population, is a defined-benefit scheme. The Pensions reform is designed to introduce a three-pension structure, but so far no developments have occurred as to the second and third pension. The latter may take the form of a defined contribution scheme. The vast majority of the population then is covered by the statutory defined benefit scheme.
5. There has been no legal provision made governing the pensions of public officers to the effect of the Barber judgment, and therefore related to the relevant provisions, and in particular Article 2, of Council Directive 96/97/EC. Malta joined the EU only in 2004. Besides, the Legal Notice relating to occupational schemes expressly provides for equality of treatment and for equal retirement ages.

### III The Three Pillar System as a whole

1. The Maltese government seems to be of the view that some form of three-pillar system is a good basis. It is working towards the regulation of all pensions on that basis. However, consensus has been difficult to obtain as to the modalities of the mandatory second pension and the voluntary third pension, although the law now provides for the possibility of their introduction. It could well be that the government's scheme can be tailored to fit the European three pillar format. However, things are not clear at the moment.
2. This is a complex issue that merits full study. This is one of the reasons for the study being carried out by the NCPE. The government is working towards a three-pillar pension system. However, I would say that, as the Barber line of cases shows, the separate pillar system of regulation can lead to different and unequal results. In Malta, we see a particular trend evolving in gender equality matters, that is to say a trend where government leads the way (with its policy on employment and social issues relating to public officers) for the public sector as a whole and then, through its influence on the social partners, encourages its policy to be used as the benchmark for the private sector. It is not really possible for me to give an overall reply to this question, and it is a main item in the research project of the NCPE, which should be publishing its report by the end of the year.

## THE NETHERLANDS

Ina Sjerps

### a) General scope of the Directive

1. *Sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and other benefits that fall within the scope of Article 3 (1) of Directive 79/7/EEC:*

- Sickness, invalidity, accidents at work and occupational diseases:

The "Wet verlenging loon doorbetalingsverplichting bij ziekte" (Wet VLZ; Act on the continuation of pay during illness) makes it compulsory for employers to continue an employee's pay during the first two years of illness. The employer legally has to pay 70 % of the last earned wage up to a level of 172.48 per work day (2007). Almost all collective agreements in The Netherlands contain obligations for the employer to pay more than that, often the full wage during one year, and 70 % of the last earned wage during the second year. During this two year period, the employee is still employed.

Only those workers who do not have an employer, like temporary workers, are insured under the Ziektewet, Illness Act.

After two years of continued illness/disablement, the employer can terminate the employment relation with an employee who is still not unable to work due to disablement.

The WIA (Wet werk en inkomen naar arbeidsvermogen; Act on work an income in relation to capacity to work) is a scheme for two purposes: those workers who are fully incapable to work due to disablement receive a benefit (75 % of the last earned wage). Those workers who are partially incapable to work receive a supplement to the income they earn with the work they are still capable of doing.

These schemes do not differentiate between occupational diseases/accidents and other causes for disablement.

The WIA was introduced in 2006 to replace the Wet Arbeidsongeschiktheidsuitkering (WAO, Act on Disablement benefit). People who already received a WAO benefit before the WIA was introduced, remain entitled to the WAO-benefit. The WAO therefore remains intact for those persons. Under this scheme, the level of the benefit depends on the last earned wage and on whether a person is fully or partially disabled.

Wajong: the Wet arbeidsongeschiktheidsvoorziening jonggehandicapten (Act on invalidity benefit for early disabled) provides a flat rate benefit at the level of the social minimum for those early disabled who have not been able to work at all before they became handicapped/ill.

- Old age:

The AOW (Algemene Ouderdomswet; Old age act) is the statutory old age pension scheme of the Netherlands. It provides all residents of the Netherlands at the age of 65 with a flat-rate pension benefit that in principle guarantees 70 % of the net minimum wage. There is no means-test for the eligibility of benefits; other forms of income have no effect on the AOW benefit.

All residents of the Netherlands between the ages of 15 and 65 are insured for the AOW. No distinction is made between men and women, between civil servants, employees, self-employed and housewives. During the period of insurance, entitlement is accrued in 2 % steps for every insured year. This leads to a 100 % entitlement to the relevant pension benefit on reaching the age of 65, provided there are no gaps in the period of insurance. A gap occurs when a person resides outside the Netherlands. People who are not entitled to the full AOW benefit and who have, together with other sources of income, a total income below the subsistence level (i.e. less than 70 % of the legal minimum wage) are entitled to receive social assistance. Residents from migrant backgrounds generally are not entitled to a full pension due to the fact that they have not resided in the Netherlands from the age of 15 until the age of 65. If their occupational pension and their AOW pension together amount less than the social minimum, they receive social assistance.

State old age pensions are financed according to the pay-as-you-go system: today's contributors finance the pension payments made to the pensioners of today.

- Unemployment

The Werkloosheidswet (WW, Unemployment Act) insures workers against unemployment. The level and duration of the benefit depend upon the last earned wage and the number of years of previous employment. The maximum duration is 38 months. In 2005 and 2006 the duration of the WW was shortened, and the previous employment demand was made more severe.

In order to soften the effect of the previous employment- demand, care years are partially counted as working years. Since 1 January 2005, years during which a claimant has cared for children under 5 years of age count for 50 % as working years (before 2006, when the duration of the WW was longer and the previous employment demand was less severe, years during which a claimant had cared for children under 6 counted as full working years, and years during which a claimant had cared for children between 6 and 12 counted as 50 %).

- Social assistance supplementing or replacing the above schemes

The Inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werknemers (IOAW; Act on the elderly or partially handicapped employees) is a social assistance scheme for those unemployed workers who were 50 years or older when they became unemployed and whose WW-benefit has expired; the scheme is also meant for those partially handicapped and unemployed workers who were younger than 50 and already received an IOAW benefit on 28 December 2005. It is a social assistance scheme at the level of the social minimum. It contains a means test but property is excluded from this means test.

The level of the social minimum is linked to the level of the net minimum wage.

The net minimum wage is 1236.86 euro per month.

The minimum for a couple is the same as the net minimum wage, 1236.86 euro per month.

The minimum for a single parent is 865.80 euro with a possible supplement of 247.37 euro per month (if they live in a household of their own).

The minimum for a single person is 618.43 euro with a possible supplement of 247.37 euro per month (if they live in a household of their own).

The Inkomensvoorziening oudere en gedeeltelijke arbeidsongeschikte gewezen zelfstandigen (IOAZ; Act on elderly or partially handicapped former self employed) is a similar scheme for elderly or partially handicapped self-employed.

The Wet Werk en Inkomen Kunstenaars (WWIK, Act on work and income for artists) is a social assistance scheme for artists. It is meant for professionally working artists who can not earn an income at the level of the social minimum with their work. The benefit is paid during a maximum of 4 years.

The Toeslagenwet (TW, Supplement Act) supplements ZW-, WW-, Wajong-, WAO- or WIA benefits if the level of that benefit should drop below the level of the social minimum.

The Wet Werk en Bijstand (WWB, Act on Work and Social Assistance) is a general social assistance scheme. Those persons who do not have an income through work or one of the above mentioned benefits can go to the municipality for assistance. The municipality is obliged to help them find work, and in the meantime, pay them a social assistance benefit. This benefit is at the level of the social minimum and is means tested.

## 2. What percentage of the population is covered by these schemes?

The VLZ, Ziektewet, WIA, WAO, WW, IOAW all cover all those who are employed either by a private or by a public employer. This is about 87 % of the total working population. The working population is 64 % of the total population. ([www.cbs.nl](http://www.cbs.nl)).

The IOAZ covers all self-employed (around 13 % of the working population).

The WWIK covers all artists, this is a small group, less than 1 % of the working population.

The TW covers all (former) employees and the early-disabled (also 87 % of the working population).

The Wajong, AOW, and WWB cover all Dutch inhabitants with a legal status.

## 3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC?

The main reasons for excluding people from receiving benefits:

For the WW (unemployment benefit), the most important reason is employment history. In order to receive a 6 month WW-benefit, an employee must have worked 26 weeks out of the last 36 weeks before unemployment. In order to receive a longer WW-benefit, an employee must have worked, an employee must have worked at least 52 days per year and 4 out of 5 years before unemployment (see above for the compensation of care years).

A possible reason for exclusion is the number of hours worked: in order to receive WW, an employee must have lost at least 5 working hours per week or more than half the working hours for an employee who worked 10 hours or less per week. This is, however, a very low threshold, and not many people will be excluded by it.

The main reason for exclusion in the IOAW, IOAZ, TW, WWB (all the social assistance type schemes) is the means test: the income, and in some cases the property of the claimant plus the income (and sometimes the property) of his/her spouse or partner is deducted from the possible benefit.

*4. In which areas and to what extent are women excluded from benefits, from access to the schemes or from more generous benefits?*

For women the employment history in the WW and the means test in the social assistance type schemes are the most important exclusions.

*6. How could this situation be amended?*

This could be amended by softening the employment history demand in the WW. E.g. by again extending the compensation for care years (see above). As for the means test, it could be removed in order to grant women an individual right to social assistance even if they have a spouse with an income, but this would overthrow the entire system of social assistance.

## **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Two benefit schemes fall within the scope of Article 3 (2):

The Algemene Nabestaandenwet (ANW), General Act on Survivors pensions) grants survivors pensions to both married and cohabitating partners, men as well as women, hetero- as well as homosexuals. The benefit is a means tested (income, not property) flat rate benefit at the level of the social minimum.

Apart from the effect of the means test (the effect of which is that more female survivors than male survivors can claim a benefit) the principle of equal treatment is applied in this scheme.

The Algemene Kinderbijslagwet (AKW), the General child benefit Act) grants child benefit to all parents of children younger than 18 years.

Gender equality is applied in this scheme, the parents of a child decide themselves to whom the benefit is paid.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

No, the Netherlands have not invoked the exclusions of Article 7 (1) of the directive.

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

No effect.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

Not relevant.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

Yes. In the Netherlands it is clear which schemes are statutory schemes and which are occupational schemes.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

Occupational pensions cover almost all employees in the Netherlands. In 1996 only 9.2 % of all employees were not covered by an occupational pension scheme. But this is not evenly distributed over the sexes: 6 % of all male employees are not covered by an occupational pension scheme against 20 % of all women. These statistics are from 1996 (J.H.M. Nelissen et al. (2000, chapter 2)).

*3. To what extent according to your estimation actuarial factors are used in this pillar?*

Actuarial factors are used in this pillar, and as far as I know, the larger schemes all operate within the limits set by the ECJ in its jurisprudence.

Larger schemes such as the ABP (civil servants and teachers' pension scheme) and PGGM (pension scheme for the health care and social work sector) have sex-neutral contributions for both employer and employee; the benefit too, is sex-neutral. However, there are hundreds of schemes, so an overview of all of them is impossible to achieve.

Actuarial factors are used in the transfer of pension rights.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

In the Netherlands, the majority of schemes is still defined benefit. Defined contribution schemes are becoming more and more popular especially in the market sector.

*5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

The official pensionable age has always been the same for men and women in the Netherlands (65). The same goes for the official pensionable age for civil servants (also 65).

### **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

Yes, in general this is an adequate instrument, and it applies well to the Netherlands' situation.

*2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

In my view, it would be worth while to make one legal instrument for all three pillars, and thus minimize the impact of the exclusions. It would also minimize the risk that cases of discrimination are contested under the wrong instrument. The exclusions from directive 79/7 should be removed from the directive: it is unacceptable that we still accept discrimination in social security, 30 years after this directive was written. The same goes for the other directives.

## **NORWAY**

*Helga Aune*

### **I. Directive 79/7/EEC**

#### **a) General scope of the Directive**

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

The National Insurance Scheme according to the Act of 28 February 1997, *Lov om folketrygd*, provide benefits for all the above listed incidents and is considered as being part of the first pillar targeted by Directive 79/7/EEC. The National Insurance Scheme provides a basic platform providing benefits to all citizens of Norway. The amount of benefits may depend on time of residency in Norway. For example, everyone is assured a basic retirement pension conditioned on a certain time of residency in Norway. Additional pension benefits will depend on number of years of employment and amount of employment. There are no schemes intended to replace the National Insurance Scheme but quite a few private insurance companies sell insurances supplementing benefits ensuing from the National Insurance Scheme.



In addition there are various laws providing compulsory additional benefits in case of for example accident or old age retirement benefits. People employed by the State of Norway are entitled to additional benefits through the *Lov om Statens Pensjonskasse* 28 July of 1949 no. 26, The Norwegian Public Service Pension Fund. People employed by counties and municipalities are entitled to additional benefits through the KLP, *Kommunale Landspensjonskasse*, a pension fund provided for by also collective agreement. There are various laws providing additional benefits for various groups of employees ranging from pharmacists, members of parliament as well as nurses and ballet dancers, these being just a few examples. The brief description of the system of pensions and benefits is thus not exhaustive, various laws and private insurance types exist in addition to the basic system as here described.

It is also compulsory for all employers to insure their employees in private insurance companies in case of accidents at work-, and occupational diseases-scheme, see the Occupational Compensation Act of 16 June 1989 no. 65, *Lov om yrkesskade erstatning*. Benefits ensuing from the Occupational Compensation Act will be in addition to sickness benefits ensuing from the National Insurance Scheme.

In recent years the parliament has focused on the need for supplementing the benefits provided by the National Insurance Scheme in the years to come with the expected aging population. *Lov om obligatorisk tjenestepensjon* of 21 December 2005 no. 124, Act regarding Compulsory Additional Pension, introduced a new compulsory pension system for the private sector thus ensuring all employees in the private sector supplementary benefits in addition to benefits from the National Insurance Scheme. The employees may chose what type of insurance suit best, a defined-benefit scheme or defined-contribution-scheme, both types regulated through legislation, see *Lov om innskuddspensjon i arbeidsforhold* of 24 November 2000 no. 81 and *Lov om foretakspensjon* of 24 March 2000 no. 16.

To complicate the picture there is also a special act regarding curtailment of benefits in relation to benefits from the National Insurance Scheme, see *Lov om samordning av pensjons- og trygdeytelser* of 6 July 1957 no. 26.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

Compulsorily insured under the National Insurance Scheme are all persons who are either resident or working as employees in Norway. The entire population is basically covered.

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

People may be excluded from receiving benefits as a result of all the reasons listed in the question. Some Acts, collective agreements, insurance agreements may still operate with conditions requiring that a person has to work at least 14 hours weekly before membership in a supplementary pension system or that a certain amount of time of employment is required before rights to membership/benefits are earned.

*4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

Women are not formally excluded from benefits. The main problem is in practice how men and women choose to organize their lives in various ways and as a result of that, women still earn less pension/retirement benefits/rights than men. Norway still has a very gender segregated employment market. Men and women are generally found in different sectors of employment. One may say that women have low paid jobs in the public sector, while men have better paid jobs in the private sector. In addition it is still a fact that men and women adapt differently to the role of parenthood. Of all employed women 43 % work part-time, while only 9 % of all employed men work part-time. As women tend to take more of the work load at home and care responsibilities they have less income and less pension points/benefits accrued.

*6. How could this situation be amended?*

Legislation could be one way of 'forcing' changes to the sharing of work at home and care obligations.

- One practical way is to make fathers quotas of the parental leave, non-transferable to the mom.

- Another possibility is to make the parents make a note in the annual tax returns that they as a couple are going to share the pension points accrued for that year in the cases where they as a family decide that one of them is going to work part-time for the best interest of the family as a unit. This would protect the women who later in life may experience divorce and learn that that they have very little pension benefits to look forward to as a direct result of having worked part-time.
- A third possibility is to award pension points for each child being born as it is in the best interest to maintain a healthy birth rate in most European countries today.
- The choice of education/employment must not be stereotyped in early childhood/education. This is a difficult challenge as most people have a perception that they do make their independent and free choices as relates to choice of education and choice of profession. It may be timely to ask how free the choices may be as the choices of employment are so stereotyped. Here all the EU/EEA member states may find the CEDAW Article 5a on changing the gender stereotypes a common tool to work for changes.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

The principle of gender equality is introduced in relation to these benefits according to the National Insurance Scheme. The Gender Equality Act of 1978, *Likestillingsloven*, also has a wider area of range than the directive.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

No exclusions have explicitly been made. However, action was brought on 19 February 2007 by the EFTA Surveillance Authority (ESA) against Norway, Case E-2/07, ESA requesting the EFTA court to declare that by maintaining in force rules in the *Lov om Statens Pensjonskasse* of 28 July 1949 no. 26 relating to pension rights accrued on the basis of periods of employment after 1 January 1994 pursuant to which the survivors pension of a widower whose spouse became a member of the Public Service Pension Fund prior to 1 October 1976 is curtailed in relation to his other income whereas a widow in the same circumstances receives her survivors pension without curtailment, Norway has failed to fulfil its obligations under Article 69 (1) EEA and Article 5 of the Act referred to at point 20 in Annex XWIII of the EEA Agreement (Directive 86/378/EEC and 96/97/EC).

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

As mentioned above. No exclusions have been made explicitly, but differential treatment as in the case above or in the form of threshold requirements in order to qualify for membership in the pension systems may prevail in the various pension systems.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

The need for threshold requirements in order to qualify for membership in the various pension systems such as a minimum employment time of at least 14 hours weekly should be scrutinized. In practice such requirements will only affect women since they are the only ones working part-time. They should have the possibility to earn their pension proportionally with their time employed. The argument for maintaining the thresholds is that it would be so costly to administer the pension for employees working so small part time positions.

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

Yes, it is always possible to distinguish between statutory pension schemes and occupational schemes in so far that the individual sections of the National Insurance Scheme will provide detailed conditions for the right to benefits for example how long duration of employment may be required before entitlement to benefits is accrued as a right.

2. *What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*  
Through the National Insurance Scheme close to 100 % should be covered.

3. *To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

Actuarial factors are used. My general impression is that employees' contributions must be the same for men and women, but as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes.

4. *Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

Defined-benefit schemes is most common for younger generations who more often than the older generations change jobs, whereas the defined-contribution scheme is more common for the older generations who may have stayed with the same employer for longer periods. As the Act on Compulsory Pension Scheme is fairly new, the older generations of employees will have their pensions dependent on any additional pensions to the National Insurance Scheme, either through various Acts or private agreements with insurance companies or through group life insurances offered through their employment or collective agreements.

5. *Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

Norway has had no tradition for different retirement ages for men and women.

### **III. The three pillar system as a whole**

1. *Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

Yes, as for Norway the three pillar system provides a good picture on how the pension system works.

2. *Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

I believe that the three pillar approach works as pedagogical instrument for the introduction of the gender equality principle in the field of pension and insurance. It is highly important though, that the exceptions from the principle of gender equality based on actuary calculations are not accepted in full. As long as the public sector has managed to create a system honouring the principle of gender equality, the private insurance industry should be able to rise to the challenge.

## POLAND

Eleonora Zielińska

### I. Directive 79/7/EEC

#### a) General scope of the Directive

In Poland when reforming the system of social security, the legislator gave it a common and unified character, in the sense that one legal act of 1998<sup>66</sup> covered not only workers, but also persons running activity other than on the basis of employment contract, whose pecuniary benefits paid from the social security were previously to the reform set forth in separate legal acts. Only the situation of persons performing agricultural activity is governed by separate act of 1990.<sup>67</sup> However even the government envisages the need for harmonization of old age benefits of farmers and their relatives with benefits of other working people.

The old age benefit granted according to the new system of social security are paid out of one, two or three sources, called pillars. Pension schemes of Polish pillar one and pillar two may be considered as being part of the European first pillar target by Directive 79/7/EEC.

In Poland the date of birth constitutes a criterion of whether a person is covered by the old (first pillar) or by the new (second pillar) system.<sup>68</sup>

The first pillar is based, similarly to the old system (before 1998 reform), on the basis of a so-called 'intra-generation agreement', i.e. the repartition system, in which money paid by persons presently working is transferred to retired persons through the reformed Social Security Agency (ZUS). However, otherwise than it was regulated under the previous system, the amount of the old age pension paid out from this pillar shall depend on the certain extend<sup>69</sup> on the sum of paid contributions, saved on an individual account, re-evaluated every year. In this system, the contribution to social security is paid in one sum, without specification of particular risks. It shall not be invested. Therefore, the situation on the investment market shall not directly influence the amount of future old age pension. It would be paid lifelong, but the contributions recorded in the 1st pillar may not be inherited, even when the insured person dies before retirement.

The second part of old age pensions shall come from the open retirement fund (2nd pillar, called capital pillar). In this pillar, part of contributions paid by the insured person is invested within open private retirement fund, administrated by Universal Retirement Society (according to the recent proposal - it may be administered by Social Security Agency (ZUS) instead, if insured person so wishes). Every contribution paid to the open fund will be calculated in settlement units, the value of which will evolve in concordance with the situation on the financial market. The sum of units multiplied by the actual price of the unit shall constitute the insured person's capital, on which the amount of this person's old age pension shall depend. The capital deposited in open retirement fund shall increase with the increase of the number of settlement units on the insured person's account in result of the influx of new contributions and increase of the unit's price.<sup>70</sup> As opposed to the 1st pillar, the means deposited on the account of 2 pillars may be inherited (under the condition that the insured person died before had retired).<sup>71</sup>

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<sup>66</sup> Act on the System of Social Security, dated 13 October 1998, JoL. 1998 no. 137, item 887, with subsequent amendments.

<sup>67</sup> The situation of persons performing agricultural activity is governed by Act on the Social Security of Farmers dated 20 December 1990. Uniform text - JoL 1998 no. 7, item 25, with subsequent amendments. The situation of persons performing extra agricultural is governed by Act on the System of Social Security, dated 13 October 1998, JoL 1998 no. 137, item 887, with subsequent amendments.

<sup>68</sup> The new system is obligatory for persons born after 31 December 1968, which means that the contribution paid from their income is shared between the 1st and 2nd pillar. Persons born before 1 January 1949, as well as the persons working exclusively in the agriculture remain only in the old system. Persons who lacked less than 15 years to the retirement age on the date of the implementation of the reform were excluded from the new retirement system, because new rules could cause an important decrease of their benefits. Persons born between 31 December 1948 and 1 January 1969 could have chosen by the end of 1999, whether to allocate the whole of contribution in the 1st pillar or whether to share it between the 1st and 2nd pillar.

<sup>69</sup> The system provides maximum pension, which may not be higher than 100 % of the basis of assessment (and the basis of assessment may not be higher than 250 % of the base amount, which is equal to average earning reduced by social insurance contributions deducted from the insured persons in the proceeding calendar year). In 2007 it amounts 2,059.92 PLN (*Monitor Prawny* (Legal Monitor) no. 12, item 126), what makes maximum old age pension circa 5,147 PZL monthly, while the average in 2005 was 1,256 PLN and guaranteed minimum old age pension 597 PLN.

<sup>70</sup> However, potential decrease of the unit's price may cause the decrease of capital, even below the sum of contributions paid on the open fund.

<sup>71</sup> In case of divorce of spouses the contributions gathered within 2nd pillar may be divided between spouses (eventually by the court).

In the both pillars the legislator introduced an enumerative catalogue of persons, who must or may voluntarily be covered by particular insurances.<sup>72</sup>

It has to be mentioned that a specific feature of the Polish social security system, reformed since 1999, is the separation of sickness insurance<sup>73</sup> from health insurance.<sup>74</sup>

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

The following schemes of Polish social security system may be considered as being part of the first pillar targeted by Directive 79/7/EEC: old age pensions insurance, disability, survivor's pensions insurance, sickness insurance, work accidents insurance.

- In respect of old age the benefits include: the retirement pay (old age pension) and nursing compensatory allowance to pensions.
- In respect of sickness and maternity the benefits include: sickness allowance, maternity allowance, care allowance, compensatory allowance, and rehabilitation benefit.
- In respect of the long-term incapacity for work the benefits include: disability pension, training pension.
- In respect of death of a breadwinner the benefits include: survivor's pension and supplementary allowance to survivors; pension for complete orphans.
- In respect of accidents at work and occupational diseases the benefits include: lump-sum compensation, benefits in respect of sickness long-term incapacity for work and death of a breadwinner, dentist services and prophylactic vaccinations, cost of orthopaedic appliances.

In addition, ZUS pays: social pension, pre-retirement benefits and death grant.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

In 2005 the number of the insured persons in ZUS was early circa 13,130,000,<sup>75</sup> what with total population on Poland of circa 38,157,000 makes circa 34.5 %. In 2005 expenditure on pensions accounted for 89.1 % of total ZUS expenditure and amounted to 99,000 million PLN for about 7.2 million persons. Payment of cash benefits from the different funds was as follows: old age pension fund – 61,017 million PLN, disability and survivors' pension fund – 37,265 million PLN, sickness fund – 4,949 million PLN, work accident fund 0 – 4,165 million PLN.<sup>76</sup>

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<sup>72</sup> Groups of persons covered by compulsory pension insurance include: employees, members of agricultural production cooperatives, freelancers, persons carrying out activity outside of agriculture, clergy, members of Parliament receiving remuneration, recipients of unemployment benefits, persons in the course of child-care leaves or recipients of maternity allowances. Compulsory sickness insurance covers persons subject to compulsory pension insurance being employees, members of agricultural production cooperatives and rural circles cooperative, persons undergoing substitute military services. The sickness insurance may be joined on a voluntary basis by persons covered by compulsory pension insurance who *inter alia*: carry out activity outside of agriculture, perform work on a basis of civil law mandatory or agency contracts. Compulsory work accident insurance covers persons subjected to compulsory pension insurance for example: employees, members of cooperatives, persons carrying out activity outside of agriculture and persons collaborating with them. Persons covered by compulsory pension insurance may - after its cessation - continue it on a voluntary basis.

<sup>73</sup> The sickness insurance provides for the payment of cash benefits in respect of sickness and maternity governed by the Law of 25 June 1999 (consolidated text: JoL of 2005 no. 31 item 267 with further amendments).

<sup>74</sup> The health insurance means the system of benefits of the preventive, diagnostic, therapeutical and rehabilitation character, financed by public resources. The scope of this system has been determined in the La of 27 August 2004 (JoL no. 210 item 2135).

<sup>75</sup> Social Insurance in Poland, Information, facts. ZUS Social Insurance Institution. Warsaw 2006, p. 19. Currently circa 12 million persons are insured under Polish second (capital pillar). In 2008 the first women shall receive the retirement benefits under this scheme.

<sup>76</sup> Social Insurance in Poland, Information, facts, ZUS Social Insurance Institution. Warsaw 2006, p. 25.

3. *What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

The Polish system of social security does not provide the general exclusion of mentioned categories of persons from receiving benefits.

4. *In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

Up to recently the self-employed persons under optional sickness insurance were not entitled to paid sick child care leave. In opposite, all employees (for which sickness insurance is mandatory) were entitled to such a leave. Those discriminatory provisions touched circa 1,9 millions self-employed persons in Poland, from which more than 1/3 are women.<sup>77</sup> This exclusion, although did not concern women only, may be perceived as indirect discrimination based on sex, since in practice women usually take sick child care leave.

It has to be in addition, pointed out, that even though the period of parental and child-care leave is considered as contributory period, paid by the State's Budget; this contribution is paid based on a minimum salary only, what shall influence the amount of future old age entitlement.

5. *How could this situation be amended?*

As concerns sick child care leave (mentioned in first example) it has been already partially amended by the Constitutional Tribunal, which in the judgment of 6 March 2007 decided that Article 32 § 1 point. 2 and 3 of the Law of 25 June 1999 on payments from social security in case of sickness and maternity is partially incompatible with Article 2 (the principle of rule of law) and Article 32 § 2 (non-discrimination clause) of the Polish Constitution of 1997.<sup>78</sup> The Tribunal in its reasoning has pointed out that the differentiation of the situation of persons under sickness insurance on the reason of its character (mandatory or optional) is contrary to the Constitution; the secured persons paying the same contributions may expect the same benefits regardless of obligatory or optional participation in the system.

However, another appearance of unjustified different treatment of insured persons depending on whether they participate in the system obligatory or optional still remains. In the opinion of the Ministry of Work and Social Policy the judgment of Constitutional Tribunal should be understood literally, what means that the persons under optional sickness insurance system are not entitled to paid leave for care of the child under age of 8 in so called emergency cases (like unexpected closure of nursery, kinder garden or school, delivery, sickness or stay in hospital of insured spouse, who usually take care of a child)<sup>79</sup>. This situation should be changed, what may be achieved by change of the law or by appropriate interpretation of existing provision, taking into account cited decision of Constitutional Tribunal.

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. *Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Yes. All widows and widowers have the right to family pension under the condition that they are over 50 years of age or incapable to work.

In case of death of one of the spouse the 50 % of the contributions gathered within 2nd pillar (capital pillar) has to be transfer on the of survivor's spouse account. Remaining 50 % is reimburse in cash to indicated person (which might be spouse).

According to the statistics<sup>80</sup> within the population over 50 years of age more than 74 % of women profit of the family pensions and only 9 % of men. Many women entitled on personal capacity to the retirement pay apply for the family pension instead since - in the rule - it is higher than their own expected old age benefit.

<sup>77</sup> 'Gazeta Prawna' 5 March 2007.

<sup>78</sup> See: <http://www.trybunal.gov.pl/Rozprawy/2007/rozprawy.htm>.

<sup>79</sup> See: <http://www.zus.pl/default.asp?p=1&id=1&idk=459>.

<sup>80</sup> National Pensions Strategy. Adequate and Stable Pensions System (2005) and its updating in chapter 3 of the 'National report on strategies for social protection and social inclusion' (2006).

The Polish law on the pensions for professional military and their families of 10 December 1993<sup>81</sup> as well as the law on the allowance for war invalids, military and their families of 29 May 1974<sup>82</sup> regulating the issue of family allowance e.g. for spouses or parents in case of killing or death of member of military service although don't contained any provisions discriminating on the grounds of sex, however provided for some regulation which put the spouses survivors in unequal situation. In particular, the amendments to those laws passed on 16 December 2004<sup>83</sup> have privileged the widowed spouses of the member of the military service, who were killed or deceased while performing military service abroad. In such a cases the family allowance shall be agreed not depending of the age of spouse or her/his state of health. Those amendments although are not discriminatory on the ground of sex, may be perceived as unfair towards other military widowed persons.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pension able age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

Polish law on social security system differentiates the pension able age in case of women and men. The right to old- age pension in this scheme is acquired by women aged 60 years with at least 20 years contributory and non-contributory period and men aged 65 years with at least 25 year contributory and non- contributory period.<sup>84</sup>

*3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?*

The different retirement age for men and women shall cause that in the future the pensions of women shall be lower then that of men.

*4. Should these exclusions in your opinion be repealed? Please specify, which and why.*

In my opinion, the old –pension age of women and men should be equalized, because the lower activity of women in employment as well as different retirement age for men and women shall cause that in the future the risqué of poverty for women shall be considerably bigger than for other groups of society. That lower old age pensions of women will result directly from the fact that on the one hand women shall have shorter period of payment of contribution (and in consequence shorter periods of cumulating thereof, joined with the capitalization; the additional 5 years of gathering of savings would result in their increase of 20 %). On the other hand due to lower age entitling them to retirement benefits they shall profit of retirement benefits for longer period of time than the men (not taking into consideration the differences in life expectations). This phenomenon may be intensified by still existing differences in women's and men's salaries As the result of maintenance that different retirement age for men and women one may estimate that in the future the old age pensions of women will be lower by a half than new old age pensions of men.<sup>85</sup>

Being aware of those interrelationships the government in 2004 has proposed the equalization of retirement age of women and men. However after social consultation with trade unions and other organizations this proposal has been withdrawn. According to the up dating of 2006 the Government plans to foster the public information campaign on this issue in 2007, followed by the introduction of appropriate change of the legal regulation in this respect in 2008.<sup>86</sup>

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<sup>81</sup> Unified text published in JoL 2004 no. 8 item 66 with further amendments.

<sup>82</sup> Unified text published in JoL 2002 no. 9 item 87 with further amendments.

<sup>83</sup> JoL 2005 no. 10 item 65.

<sup>84</sup> It may be also acquired by a women who has reached the age of 60 years and has completed at least 15-year contributory and non-contributory period and a man aged 65 years with 20 year such a periods, but this old age pension is not subject to increase to the amount of minimum guaranteed old age pension. The insured persons may acquire the full old age pension in the age of 55 years if, they have proved 30 – year contrinutory and non-contributory period and at the same time have been recognised as completely incapable of work (men, after reaching 60 of age if they have proved at least 25 year contributory and non-contributory period).

<sup>85</sup> Compare also: National Pensions Strategy. Adequate and Stable Pensions; s System (2005) and its updating in chapter 3 of the document of 2006. The Minister of Work and Social Policy recently confirmed that that due to the different age, if the women who at the moment is 52 years old, would go on retirement being 60, she will get 58 % of her last salary, if she would take such a decision 5 years later, her pension shall reach 86 % of present salary. See: <http://www.kobiety.pl/index.php?option=art&id=6670>.

<sup>86</sup> However it has not be mentioned that according to the opinions of some economic experts the prolongation of retirement age of women up 65 may be the remedy for the collapse of the system expected in circa ten years. On the other hand in September 2006 the Minister of Labour and Social Policy declared that there will be not the prolongation of the retirement age of women since 'Polish women would like to raise the grand children' and thereby making possible for children's parents to continue work. *Gazeta Wyborcza* 14 September 2006

It might be added that the difference in the retirement age for men and women has been removed in 2004 from the law on occupational security schemes (Workers Retirement Program).

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

The Polish third pillar, which correspond with mentioned above directives encompasses different forms of voluntary insurances, including occupational scheme 'Workers' Retirement Programs' (PPE) created by employers for their workers set forth in 1998 (and currently regulated on the basis of Act of 2004)<sup>87</sup> and since September 2004, in addition, a new private scheme so called 'Individual Forms of Savings' (IKE).<sup>88</sup>

The participation in this retirement programmes is not related with the coverage by the new retirement system. Therefore, also workers, who are subject to the old retirement rules of Polish 1st pillar (due to their age), may join this programme.

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

The answer should be negative if we take into consideration this criterion, because in Poland the statutory pension schemes are also, to certain extent related to pay and work - relationship.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

According to the information received from Ministry of Work and Social Policy under occupational scheme remained in 2005 - 260,250 persons. Individual retirement accounts in 2005 had 840,243 persons among, which 454,429 women and 385,833 men.

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectance of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Article 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

The Polish social security regulations provides the special equal treatment clause (Article 2a of the Act on the system of social security)<sup>89</sup> and uniform for women and men life tables (based on the assumption that average duration of women and men lives are the same). Such supposition make possible to pursue such redistribution of benefits, which cover up the differences resulted from demographic reasons. However the system don not equalize the differences between the benefits of women and men resulted from the differences of real salaries obtained by women and by men for the same or comparable work. In the opinion of Government those differences should be eliminate by employment policy aimed at equal treatment of women and men on labour market.

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'Grandmothers save the pension system.'

<sup>87</sup> Act on Occupational Pension Schemes of 20 April 2004, JoL 2004 no. 116 item 1207.

<sup>88</sup> Act on Individual Forms of Savings of 20 April 2003, JoL 2004 no. 116 item 1205.

<sup>89</sup> Article 2a of the Act on Social Security Systems of 1998, which states that: 'the act stands on the ground of equal treatment of all insured persons regardless of sex, civil status, family status, as well as specifying that the principle of equal treatment applies in particular to: 1/ conditions of coverage by the social security system, 2/ the duty to pay and assess premiums for social security, 3/ assessment of the benefit level, 4/ the period of benefit payments and maintaining rights to benefits.' This provision also provides that an insured person who believes he/she was denied to right to equal treatment has the right to assert court claims. The Act on Occupational Pension Schemes does not provide for a similar guarantee. It can be assumed that the regulations enshrined in the Constitution relating to the principle of equality and non-discrimination as well as Article 2a of the Act of 1998 on the Social Security Systems may apply also to the occupational pension schemes, but in order to avoid the possible controversies and to facilitate pursuing the claims it has been recommended to reiterate this principle in the Act on the Occupational Pension Schemes alongside with the guarantee for access to social security courts. In addition, the doubts remain regarding those regulations of the Act on the Occupational Pension Schemes which maintain a different retirement age for women and men also in the situation where an employer covers part of the premium.



4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?

Defined contribution schemes, because only the level of contributions paid every month is fixed but the final amount of benefits which will be paid to the retired person stays open until the date of retirement.

5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?

The Poland in case of civil service the differentiate retirement age for women and men still remain. As far as for today the Act of 18 May 1998 on civil service in respect of age has been amended in 1999<sup>90</sup> only in referral to the dissolution of labour contract with civil servant which now, in case of men and women, is admissible if the civil servant reached the age of 65 and had already employment period required for retirement benefits.

### III. The three pillar system as a whole

1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?

I think that it is incompatible.

2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?

In my opinion it is misleading and rather hindrance to gender equality, what has been evidence by the problems with equalization of old pension age of women and men.

## PORTUGAL

Maria Do Rosário Palma Ramalho

### Preliminary remarks

Prior to our answers to the questions asked, we must underline that the Portuguese Social Security System is currently in the middle of a global reform, for reasons related mostly to the economical sustainability of the system itself.<sup>91</sup> In this sense, the main principles of this system so far have been questioned for sometime, new principles on the subject have been presented by the Government,<sup>92</sup> and the Parliament has just approved a new general law on the subject - Social Security General Law, approved by Law no. 4/2007, from 16/01/2007.<sup>93</sup>

This new general legislation reflects the major trends that have been discussed for quite sometime regarding the reform of the social security system as a whole, especially the change of some of its traditional pillars (the traditional distinction between private workers and civil servants social security systems, the traditional subsystems inside the general social security system, the traditional formulas to calculate the various benefits, especially old-age pensions, and the private involvement of persons in the system by the creation of their own reform plans).

<sup>90</sup> JoL 1999 no. 49 item 483.

<sup>91</sup> One must take into consideration that the system has both a universal vocation, in the sense that every citizen has the right to social security protection, and a public nature, depending almost exclusively upon the National Budget for Social Security, which is a part of the National Annual Budget. In this situation, the problem of economical sustainability of the system is of major significance.

<sup>92</sup> Resolution from the Ministers' Council no. 141/2006, from 25/10/2006.

<sup>93</sup> This law replaces the former General Law on the subject, from 2002 (Law no. 32/2002, from 20/12/2002).

Given the fact that the legislation now approved needs to be developed by further ruling, but, until this new ruling is approved, the legislation created under the former Social Security General Legislation will keep into force,<sup>94</sup> the system is very uncertain for the moment.

Under these circumstances, all the references that we are going to do in this Report should be considered provisional and incomplete. Also, we are not able to answer to some more specific questions, due to the changing of the whole system.

## I. Directive 79/7/EEC

### a) General scope of the Directive

#### 1. Situations covered by first pillar targeted by Directive 79/7/EEC

In Portugal, most of the social security provisions fall under Directive 79/7/EEC scope, since professional social security schemes are quite rare. This being the case, the situations contemplated by the Directive are covered by the Social Security General Law. This Law establishes two social security systems: the first one is the 'system of social citizenship protection',<sup>95</sup> which integrates a subsystem called 'social action subsystem' (intended to promote actions in the social area)<sup>96</sup>, the 'solidarity subsystem' (intended to eradicate poverty in the situations that do not fall under the 'contribution' system)<sup>97</sup> and the 'family protection subsystem' (intended to compensate people for specific family charges);<sup>98</sup> the second one is the 'contribution system',<sup>99</sup> and it is intended to compensate social risks of persons with a professional activity and based upon the contributions of employers and employees. This last and more general system integrates social protection related to sickness, invalidity and old age pensions, family allowances (in situations related to maternity, paternity and adoption), unemployment, accidents at work and occupational diseases, in the sense of Directive 79/7/CEE (Article 52 of Law no. 4/2007).

The rights granted by this general legislation are developed by specific legislation<sup>100</sup> and each benefit is given under specific conditions. The system being different from one benefit to another, these situations must then be considered separately.

The key points regarding the several situations covered are the following:

1. Old age and invalidity pensions: in what regards dependant workers, these pensions are dealt with in Decree-Law no. 329/93, from 25 September 1993, with the changes introduced by Decree-Law no. 35/2005, from 19 February 2005; in what concerns independent workers, these are dealt with in Decree-Law no. 328/93, from 25 September 1993, as amended by Decree-Law no. 119/2005.
2. Sickness allowance: this allowance is dealt with by Decree-Law no. 28/2004, from 4/02/2004, as amended by Decree-Law no. 146/2005, from 26 August 2005. The social protection in sickness is applicable to dependent workers; in what regards independent workers, this protection is only granted if they are covered by an enlarged social protection scheme, which depends on their own choice (Article 3/1 from Decree-Law no. 28/2004, from 4 February 2004).
3. Accidents at work: the Portuguese system regarding social protection for accidents at work is not of a public nature, but relies on a private insurance contract which is compulsory for the employer. The provisions regarding this situation are on a specific legislation (Law no. 100/97, from 13 September 1997), but since this legislation is prior to the Labour Code<sup>101</sup> and the Code has introduced several changes in the system (articles 284 and ff. of the LC), a new legislation on the subject is now in preparation, so the ruling of the Labour Code on this issue is still not into force and whole system is quite uncertain for the time being; the present system establishes the right to a compensation or to a pension if a permanent disability comes of the accident.
4. Occupational diseases: these diseases also fall under the scope of Law no. 100/97, from the 13 September 1997, and now of the Labour Code (articles 309 and ff.), but the LC ruling on this issue are not yet applicable since they wait for the new legislation; the present system establishes the right to a damage compensation and to a pension.

<sup>94</sup> Law no. 4/2007, from 16/01/2007, Article 109/2.

<sup>95</sup> Law no. 4/2007, from 16/01/2007, Article 6 and ff. ('*sistema de protecção social de cidadania*').

<sup>96</sup> The social action system ('*subsistema de acção social*') is ruled in Article 29 and ff. of Law no. 4/2007.

<sup>97</sup> The solidarity social system is addressed to people who didn't work enough time to have access to social benefits under the regular 'contribution' system, and contemplates benefits related to old-age, invalidity, death, or insufficient income (Article 41 of Law 4/2007).

<sup>98</sup> The family protection system is ruled in Article 44 and ff. of Law no. 4/2007 and it contemplates several economic benefits related the raising of children, handicapped and dependant persons.

<sup>99</sup> This system ('*sistema previdencial*'), is ruled in Law no. 4/2007, from 16/01/2007, Article 50 and ff..

<sup>100</sup> But we underline the fact that this legislation is still based on the former Social Security General Law (from 2002), where this system division was different.

<sup>101</sup> The Labour Code (LC) was approved by Law no. 99/2003, from 27/08/2003.

5. Family allowances, related to maternity, paternity and adoption: social security protection in this field is granted by the Labour Regulation Act<sup>102</sup>, both for private and for public workers, although with some minor differences (article 103 of the LRA, for private workers, and article 107, for public workers). The rules of the LRA are complemented by specific social security legislation, mainly Decree-Law no. 154/88, from 29 April 1988 as amended by Decree-Law no. 77/2005, 13 April 2005.
6. Unemployment: the benefits related to unemployment are established in a specific law (Decree-Law no. 220/2006, from 3 November 2006).

This general scheme of provisions, that comes out of the public social security system, was conceived for private workers (except in what concerns maternity and paternity provisions, which are common), since public workers have their own social security schemes.

However, under the general reform that is going on, the tendency is to promote a complete integration of the public servants in the general social security system. In this sense, several Acts have already been approved in order to promote this integration - Law no. 60/2005, from 29 December 2005 (general rules for this integration), developed by Decree-Law no. 55/2006, from 15 March 2006, and Decree-Law no. 117/2006, from 20 June 2006.<sup>103</sup> However, since this process is not complete, the final outcome of this reform is still uncertain.

Finally, due to the predominantly public nature of the social security system in our country, we cannot find social assistance schemes which intend to supplement or replace the legal schemes referred to above, in the sense of Article 3 (1) (b) of Directive 79/7/EEC, except in the few areas where professional schemes are still admitted.

#### *2. Percentage of the population covered by social security schemes, targeted by Directive 79/7/EEC*

Although we did not have access to statistic data related to this issue, we can state that the great majority of the Portuguese population is covered by the scope of Directive 79/7/EEC, under the schemes developed by the several Acts indicated above, since professional social security schemes are quite rare, and limited to specific branches of economical activity (for instance, banking services).

#### *3. Reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC.*

The main reasons for excluding people from receiving benefits in the Portuguese social security system have been, until now, a too short time employment, since almost all benefits depend from a minimum period of paid work with registered contributions to the social security system. This minimum period differs in each benefit, but it is the same for men and women.

On the other hand, leave periods related to maternity and paternity are taken into account as working time, so that social security benefits cannot be excluded for minimum contribution time on that account.

Of course, we do not know if the situation will remain the same in the future legislation that develops the new Social Security General Law.

#### *4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?*

In our country, women cannot be excluded from social benefits on a gender basis. Nevertheless, it is to be noticed that the amount of their old-age and invalidity pensions is, in general, lower than the amount of similar pensions for men, due to the salary gap between men and women (since the salary is the basis for the calculation of these pensions) and to the fact that women's careers are usually shorter than those of men.

In what concerns discriminatory practises in access to social benefits, we have no specific information that allows us to answer to this question.

#### *5. Measures already put into place to eradicate discrimination in this area*

Regarding the pensions' gap between men and women that we have described above, we indicate two recent legal developments in our country, the first of which may have a positive influence in this situation, but the second one with a negative influence:

<sup>102</sup> The Labour Regulation Act (LRA) develops the provisions of the Labour Code and was approved by Law no. 35/2004, from 29/07/2004.

<sup>103</sup> This legislation was approved for public employees that celebrate a labour contract with a public body and had previously a public relation with the State, and puts into place a transitional system to assure that integration in the general social security system.

- a) In pursuing the objective of granting the basic citizenship protection in the area of pensions, it has been recently approved a special scheme called *Complemento Solidário para Idosos* (Solidarity Complement for Elderly)<sup>104</sup>, that intends to grant a minimum level of income to elderly people with very low resources (at first, this special benefit is applicable to persons over 80 years old but it is now extended to persons over 70 years old).<sup>105</sup> This measure is applicable regardless the sex, but given the fact that women live longer than men, they tend to benefit more from this measure.
- b) On the opposite sense, a new rule that was put into place regarding the formula to calculate the value of old age and invalidity pensions (unlike the previous rule, this rule takes into account not only the best ten years of the last fifteen years of contributions to the social security system, but the whole years of contributions, to calculate the value of the pension)<sup>106</sup> may have a disproportionate effect on women's and on men's pensions, since the salary gap between men and women is often more relevant at the beginning of the career than in the final years of work. We have no information if the gender factor has even been taken into consideration when this measure was approved, we cannot put aside this negative effect.

## **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

### *1. Gender equality principle in relation to family benefits and survivors' benefits, excluded from the Directive by Article 3 (2)*

In Portugal, family benefits and survivor's pension are also contemplated by the Social Security General Law, and therefore submitted to the gender equality principle, which is established as one of the general principles of this legislation (Article 7 of Law no. 4/2007, from 16 January 2007). Survivors pension is dealt with in Decree-Law no. 322/90, from 18 October 1990, complemented by Decree 1/94, from 18 January 1994 and by Law no. 7/2001, from 11 May 2001. At present, some proposals are being discussed regarding the grounds and the calculation formula of this pension, in order to take into account the income of the surviving spouse or companion, as well as to increase the value of this pension when it is accorded to the children of the diseased,<sup>107</sup> but there no discriminatory practises are to be noticed.

Family benefits are ruled by Decree-Law no. 176/2003, from 2 August 2003, already amended by Decree-Law no. 41/2006, from February 2006. There are no discriminatory practises to be noticed regarding these benefits.

### *2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Article 7 (1) of Directive 79/7/EEC?*

Not to our knowledge.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

### *1. Distinction between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship).*

Under the present system, it is easy to establish that distinction, since the two schemes are treated in a separate way by the law. However, given the present reform of the whole system, we cannot anticipate if these differences will still be noticeable in the future.

### *2. Percentage of men and women (gender-desegregated estimation) covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system.*

We could have no access to statistic data concerning this question.

### *3. The use of actuarial factors in this pillar.*

As far as we know, in professional pension schemes, both employees' and employers contributions are the same, regardless the fact that the employee is a men or a women and regardless the fact that the pension scheme is based on a defined-benefit scheme or on a defined-contribution scheme.

<sup>104</sup> Approved by Decree-Law no. 232/2005, from 29/12/2005.

<sup>105</sup> This change has been introduced by Decree-Law no. 236/2006, from 11/12/2006.

<sup>106</sup> This new formula to calculate the value of old age pensions was introduced by Decree-Law no. 35/2005, from 19/02/2005, which changed Decree-Law no. 329/93, from 25/09/1993.

<sup>107</sup> This proposal is integrated in the negotiations between the Government and the social partners with the aim of reforming the social security system.

#### *4. Tendency prevailing in the country regarding defined-benefit schemes or defined-contribution-schemes.*

As we said earlier, in Portugal professional social security schemes are very rare, due to the public and universal scope of the general social security scheme. Over the years almost all specific social security schemes (some of which covering many benefits and others with a more limited scope) have been integrated in the public social security scheme.

The main area in which specific social security subsystems still exist is in the financial sector, especially in banking companies. In these cases, the systems rely on collective agreements and may differ from company to company: sometimes the system is based on a complementary pension (meaning, the company grants a social security benefit to the worker to complete the benefit that he already has from the general social security system), while, in other cases, it is based in a substitutive full pension for which the company is fully responsible. As far as we know, these systems rely mostly in defined-benefit schemes.

#### *5. Adjustment of retirement age*

This question does not apply to Portugal, since retirement age is the same for men and women, both in public service as in the private sector. Portugal has equalized the retirement age for men and women after the Barber Judgement (before that women could retire at 62, and men at 65, and now they can both retire at 65)<sup>108</sup>.

In some specific activities retirement age is lower than that limit (for instance, police, dancers, or airplane pilots), but this difference is related to the activity itself and is applicable both to men and women.

### **III. The three pillar system as a whole**

#### *1. The three pillar system as a meaningful instrument to describe the different schemes in the Member States*

We think that the great variety of social security systems not only between the Members States but also inside each Member State (the Portuguese situation is a good example) makes it very difficult to reduce the national systems to the segregated approach that comes out of the three pillar system - at least in the Portuguese case.

Therefore, we have some doubts on the efficiency of this approach to understand this reality and its main trends.

#### *2. Contribution of the three pillars' approach to the promotion of gender equality*

In our view, the advantage of the three pillars approach from the perspective of gender equality principle is that this approach shows that gender equality must be actively promoted in all social security systems, either public or private, statutory or professional - and at least in my country we think that the importance of this principle in some of this areas would be more difficult to recognise under a more general and integrated approach.

However, since this approach is, in itself, hard to understand and to apply, I think that one legal instrument regarding social security and gender, with a wider scope (in order to apply to all different social security systems that are in place), might be more efficient to the promotion of gender equality in this area.

## **ROMANIA**

*Roxana Teşiu*

Before proceeding to a detailed description of the elements of social protection system present in the Romanian legislation as provided for by Directive 79/7/EC and Directive 86/378/EEC as amended by Directive 96/97/EC, an important observation shall be stated: Romania is currently undergoing a profound reform of the pensions' system, as well as of the social protection system. Such reform being under development makes it very difficult an accurate description of the legal framework applicable in the mentioned fields. It is also important to be observed that the way the pensions' system is structured in the Romanian legal framework does not mirroring the pensions' legislation elements as there are present into the pertinent Directives.

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<sup>108</sup> However it is to be noticed that the age for retirement is one of the questions that is being discussed in the Reform process of the Social Security legislation.

Therefore, the main implication is given by a growing difficulty in establishing to which extent Romanian legal framework does accurately transpose legal standards as present into Directives. The Romanian pension system has undergone numerous reforms in the last five years aimed at improving the sustainability of a system confronted with demographic challenge and likely issues of future adequacy. The system as reformed is constituted of a mandatory, pay-as-you-go (p-a-y-g) scheme (first pillar - public pension), voluntary individual pension funds (third pillar, entered into force since 1 January 2007) and the development of a mandatory system of individual accounts (second pillar, expected entry into force is 1 January 2008).

## **I Directive 79/7/EEC**

### **a) General scope of the Directive**

1. Under the first pillar targeted by Directive 79/7/EEC with regards to social assistance schemes the corresponding national legislation is represented by the Act no. 19 of 2000 on the public pensions' system and other rights related to social insurance.<sup>109</sup> According to the Article 40, the following types of pensions are granted by the public system:

- Old age pension
- Anticipated pension
- Partial anticipated pension
- Invalidity pension, and
- Survival pension.

According to legal provisions of Article 126(1) of the 2000 Act no. 19, in addition to the mentioned types of pension, persons insured within the public system have the right to paid support in case of death. In the case of death of the insured person or of the pensioner, only one person can benefit from paid support in case of death under the condition to prove that is supported the expenses occasioned by death. This person could be, upon case, the surviving spouse, the child, the parent, the tutor or the successor. In the case of absence of all these categories of persons, any person who meets the above mentioned condition can receive the state paid support in case of death. In regards to sickness-, accidents at work- and occupational diseases-schemes and associated benefits as mentioned by Directive 79/7/EEC, relevant legal provisions are comprised in the Emergency Ordinance no. 158 of 2005 on leaves and allowances of state health insurances.<sup>110</sup> Article 2 of the Emergency Ordinance 158 of 2005 stipulates that medical leaves and health state insurances available to persons ensured in the public insurances system are represented by:

- Medical leaves and allowances for temporarily work related incapacity, caused by ordinary sickness and accidents outside of labour;
- Medical leaves and allowances for preventing sickness and recovering of the work capacity applicable only to situations resulted from work related accidents or professional sickness;
- Medical leaves and allowances for maternity;
- Medical leaves and allowances for taking care of sick child;
- Medical leaves and allowances for maternity associated risk.

Article 1(1) of the Emergency Ordinance no. 158 of 2005 specifies the categories of persons who could be insured, upon meeting three specific requirements:

- a. Benefit from an individual labor contract;
- b. Develop activities in elected positions or are appointed within executive, legislative or juridical bodies. The insurance is to be available during the appointment period of time.
- c. Benefit from monthly payments granted from unemployment state budget, upon law requirements.

Furthermore, Article 1(2) stipulates that other categories of persons could be covered by the health state insurances system in case they are not covered by the provisions of the previous paragraph and they belong to one of the following categories:

- Associates or shareholders in business associated entities;
- Administrators of managers developing their activity under a management labor contract;
- Members of the family associations;
- Natural persons authorized to develop independent activities;

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<sup>109</sup> Act no. 19 of 17 March 2000 on the public pensions' system and other rights related to social insurance. It is worthwhile to mention that the Act no. 19 of 2000 was modified since its adoption by more than 20 distinct legal norms. Such a reality determines considerable difficulties for the one analysing the changes in the system of public social insurances, as well as it burdens the subjects in need to apply the legal provisions in the field.

<sup>110</sup> Emergency Ordinance no. 158 of 2005 on leaves and allowances of state social health insurances, published in the Official Gazette no. 1074 of 29 November 2005, as modified by the Act no. 399 of 30 October 2006, published in the Official Gazette no. 901 of 6 November 2006.

- Persons who entered into a social insurances contract for leaves and allowances granted in regards to maternity and taking care of the sick child under the condition of beginning the contribution payment starting with 1 January 2006.

The right to be granted the above mentioned leaves and allowances is conditioned by the pay of the contribution to the state health social health insurances. The quantum of contribution to mentioned state insurances is established following very complicated schemes as provided for by law.

Social assistance schemes intended to supplement the referred above schemes as provided by the article 3(1)b of the Directive 79/7/EEC are covered in the Romanian legislation by legal provisions of Act no. 416 of 2001 on the minimum guaranteed wage<sup>111</sup> and seem to be more extensive than the Directive's scope. According to legal provisions of article 1(1), families and single persons in Romania have the right to a minimum guaranteed wage granted under the law provisions as a form of social assistance. In the case of family assistance, the level of minimum guaranteed wage is established in specific conditions and calculation schemes described in article 4(1) and it is based on number of family persons. In the case of single persons, the quantum of minimum guaranteed wage is fixed of 96 RON (approximately 30 euro). Another social assistance form as stipulated by the Article 22<sup>1</sup> available to families and single persons with low incomes is represented by the state paid support for residence heating calculated based on the net monthly wage. Social state support is also available to wives of military personnel enrolled in the army (Article 23(1)). The social state support is provided in the situation wives are falling under one of the following situations:

- Do not earn incomes or these incomes are lower than minimum national salary;
- They are pregnant. In this case, the social state support is granted starting with the fourth pregnancy month;
- Undertake care of children up to seven years old;
- Are granted first or second level of invalidity.

New born babies allowance is also granted in a fixed quantum to mothers as a form of social assistance for the first 4 children born alive.

2. In 2005, the p-a-y-g system paid pensions to 4.6 million pensioners out of a pensioner population of 6.1 million. In addition, 1.3 million independent farmers, the military, police and lawyers benefit from pensions that are paid directly from the state budget under a different pension formula. Independent farmer pensions were briefly paid from the reformed p-a-y-g system, but they were transferred out of this system in 2005 to be paid from the state budget based on their previous accruals under the previous system. Budget efforts aim to their pensions increasing up until 2008, though they are still significantly lower than the average pension paid by the p-a-y-g system. Out of an officially employed population of 9.1 million, 5.3 million workers are currently accruing rights under the new p-a-y-g system. In comparison to previous legal provisions before the pensions reform was initiated, legal coverage of all types of workers has increased, with particular emphasis on the potential inclusion of those who were unemployed or self employed. However their inclusion is voluntary rather than mandatory enforced by the state. In regards to invalidity pensions, data for 2005 shows a number of 823,000 disability pensioners (18 % of those receiving an age-limit pension). There is a higher percentage of people who have entered retirement due to grade II of disability (67 %), as compared to the percentage of people retired due to a grade I or grade III of disability (33 %)<sup>112</sup>.

3. Main reasons for which people are excluded from receiving benefits under public social assistance schemes are represented by the absence of the contribution to the pensions' budget and to other social insurances schemes. There is no minimum level established by law for the pension granted under the first pillar and therefore the pension could be extremely small, sometimes even ridiculous in terms of money value. However, it is to be mentioned that for persons earning of very small pension, different forms of social assistance are available, as described above. Provisions for those unable to contribute to social contributions due to the periods out of paid work such as maternity leave, sickness, university education and military service are subject to a crediting system that rewards (though less generously than if in paid work) these periods of non contribution.

<sup>111</sup> Act no. 416 of 2001 on the minimum guaranteed wage, published in the Official Gazette no. 401 of 20 July 2001, as modified by the Act no. 115 of 4 May 2006, published in the Official Gazette no. 408 of 11 May 2006.

<sup>112</sup> Toma, C. 'Pension Contributions in Romania', 2005.

4. In regards to women excluded from benefits, from access to schemes or from more generous benefits, the answer is very difficult due to the absence of statistical relevant data available for such detailed areas. Studies in regards to social protection and social inclusion are issued especially by the Ministry of Labor, Social Solidarity and Family.<sup>113</sup> However, these studies present an overall description of the poverty evolution in Romania without analysing the causes for different sources of poverty or offering specific gender segregated data. Romania's pensioner poverty for year 2005 shows a poverty rate of 17.2 % for those over the age of 65 (Eurostat data). In this regard, there is to be pointed out the large gender discrepancies at risk of poverty, as long as 20.8 % of women over the age of 65 are at risk of poverty compared to only 12% of men. Women from rural areas, as well as women working in the agricultural sector are getting very low benefits and have a difficult access to protection schemes. There is a separate pensions' fund for agricultural workers and 78 % of the beneficiaries are women. Starting with 1989, the contribution for social insurances system on behalf of agricultural workers was optional and the consequence was that vast majority of these workers did not pay it and that lead to a severe poverty of this segment of workers. Another group of women excluded from benefits are women from informal economy and independent workers (especially in mass media and advertising). Declaring a very small wage (at the level of minimum national wage) in these cases is a common practice imposed by employers. Usually the rest of salary up to the agreed salary is paid through an intellectual property contract in order for the employers to avoid paying the contribution to the pensions' and other social insurances budget. Another source of lowering women's pension comes from the fact that the contribution to the public pension during maternity leave and parental leave (that can last up to two years) is established based on the minimum national wage.

An interesting situation in regards to more generous benefits is to be highlighted related to gender disaggregated data on highest pensions registered in the public system: in 2005, while 7329 men had a pension exceeding 300 euro per month, only 2008 women had benefited from the same pension and while 24 men had a pension exceeding 1,200 euro per month, only 3 women had this pension.<sup>114</sup> The main factor that explains the observed gender differences in the high pension group is employment sector. Most of these pensioners worked in economic sectors such as mining, heavy industry, the army, the police, and the intelligence services, where salaries are much higher than average. Such differences can be rectified, regardless of the computation formula, only through political will to promote a strategy for increasing the presence of women in more advantageous wage categories of the labour market.<sup>115</sup>

6. The situation shall be amended through several legal solutions:

- By imposing a minimum pension level as granted in the public system (first pillar).
- Establishing calculation basis for pensions' contribution during maternity and parental leave the as the medium of wages earned for the last 12 working months before leave starts.
- Equalizing the pension age for women and men.

#### **b) The exclusions mentioned in the Article 3(2) and Article 7(1) of the Directive 79/7/EEC**

The principle of gender equality is to be observed in regards to family benefits and survivors' benefits in the sense that applicable Romanian legal provisions do not distinguish between women and men, not their application is jeopardizing women or men interests. Determination of pension age is not reflecting gender equality as still there is a five years difference between envisioned women's pension age of 60 and men's pension age of 65 (retirement age will increase from 57 to 60 years for women and from 62 to 65 years for men, in a step-by-step approach until 2014; in the same period the minimum contribution period for both sexes will increase from 10 to 15 years). As the contribution to the public pension during maternity leave and parental leave is established based on the minimum national wage and as women are representing the vast majority in accessing parental leave, the consequence is that they benefit from a lower pension and that could be perceived as a sanction applied for undertaking parental leave.

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<sup>113</sup> The most recent study is referring to National Strategic Report concerning social protection and social inclusion, Bucharest, September 2006.

<sup>114</sup> National House for Pensions and Other Social Insurance Rights unpublished data, in 'The Gender Dimension of Social Security Reform. Case studies of Romania and Slovenia', ILO report, 2005, page 70.

<sup>115</sup> Ibidem, page 70.



## II Directive 86/378/EEC as amended by Directive 96/97/EC

1. As Romania lacked to specifically transpose the provisions of Directive 86/378/EEC as amended by Directive 96/97/EC, a new legal proposal is in place in regards to addressing the transposition aspect: Emergency Ordinance on the application of the principle of equal treatment between men and women within professional schemes of social security (EO proposal from now on). The future adoption of this legal norm would permit to a certain extent to distinguish between statutory pension schemes and occupational schemes. However, it is to be mentioned that in a sense, statutory pension schemes (not related to pay or to work-relationship) are not present in a pure way in the Romanian pensions' system. Such an aspect is due to the fact that public pension is subject to a new calculation formula, based on a points system taking into account incomes throughout a career (rather than only focusing on a small portion), with strong redistributive elements inherent in the calculation. The revised method for calculating pension benefits takes into consideration that monthly incomes throughout a working life are turned into points and the average number of points is multiplied by an annually established value.

2. Occupational pensions' system will be likely to be established after the EO proposal will come into force. As occupational schemes are not yet functional in the Romanian pensions' system, no data can be provided in regards to the percentage of women and men covered.

3. Private pensions represent savings based on individual accounts and have no solidarity dimension in the accumulation period. Rather, the main determinant of benefit levels is an individual's own contributions. Thus, the gender differences in all three elements that influence individual contribution are clearly disadvantageous for women,<sup>116</sup>

- According to National Institute for Statistics, the average earned income for women as a group was about 86 % of that for men in 2004. Thus, if a man and women with average earnings for their sexes work the same number of years and retire at the same time, the woman will receive a private benefit that is smaller by about 14 percent.
- However, the average contribution period is shorter for women as a group than for men. This is due to the generally earlier retirement of women, as well as to the time they spend out of the workforce for maternity and raising children. This difference too will be reflected directly in a lower private benefit amount.
- Life expectancy at the age of 60 is 3.4 years longer for women than for men in 2004 (source: National Institute for Statistics, unpublished data). Thus, if gender specific life expectancies are used for computing private annuities (as is the general practice of private savings funds when left on their own, without government regulation of this decision), a woman who had the same earnings, made the same contributions, and worked the same number of years as a male colleague would receive a significantly lower pension benefit.

Overall ILO estimates for Romania that the above mentioned three factors would reduce the average woman's pension benefit by about 34 %, if they are applied to the present situation.

To be more accurate, these estimates should be applied only to the generation under age 35 that will be required to participate in the mandatory second pension pillar.<sup>117</sup>

4. In Romania is prevailing the defined contribution schemes for all the three pillars of the pensions system.

5. Pensions of civil servants are currently covered by the first pillar (public pension) of the pensions system, where the same difference in pension age between women and men is to be achieved by 2014 (65 age for men and 60 for women). There are legal proposals under consideration on behalf of the National Agency for Civil Servants in regards of setting up a specific pensions system for civil servants. However, no official legal proposal came yet into light. It is also to be mentioned that the pension systems for persons working in the Ministry of Defence, Ministry of Internal Affairs, Romanian Intelligence Service and the other intelligence services are usually excluded from official statistics. The institutions manage the pension systems separately, and they refuse to make public statistical data that would allow a relevant comparison of pension costs and benefits.<sup>118</sup>

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<sup>116</sup> Ibidem, page 75-76.

<sup>117</sup> Ibidem, page 76.

<sup>118</sup> Ibidem, page 72.

### III The three pillar system as a whole

1. Giving the large variety of different pensions schemes existent in the EU member states it is likely to state that the three pillar system is the only construction able to permit the investigation of the national pensions systems, as well as social security systems. It is hardly to envision what other legal construction could replace the three pillar system. On the other hand, both ILO and the World Bank are using the same system and that validates its unique value for the moment.

2. Pillar based approach could leave space for observing how gender equality is mainstreamed into the system, under the condition that specific and extensive investigation is done for member states under each pillar. On the other hand, more clarity is required under the third pillar and private insurances in regards to annuities use in calculating the private pensions.

## SLOVAKIA

*Zuzana Magurová*

The year 2004 brought changes that significantly modified the whole concept of social security by adopting the act on social insurance and the act on old-age pension saving. This reform (based on two-component basic tier created by pension insurance and old-age saving in combination with voluntary supplementary pension saving) was rather different in comparison with the initial ideas and principles of social security reform formulated in the early 1990s (created by mandatory statutory basic PAYG tier of social insurance and voluntary, supplementary occupational insurance, combined with self-fund, commercial pension coinsurance). The new system is universal for all productive citizens with the exception of armed forces (policemen, soldiers).

The Slovak social security system is based on three schemes:

- I. social insurance**, which secure decent in old age, invalidity, survivor, pregnancy, disease;
- II. state social benefits**, which are direct financial contributions by the state to aid in overcoming and undesirable fall in the population's standards of living due to the occurrence or lasting of certain events in the lives of families (dependent children) and citizens;
- III. social assistance**, which is the approach of the state to the citizen in need, where the role of the state is only to assist the citizen in overcoming his/her crisis situation. It is expected that the citizen will actively seek out his/her crisis situation.

Social insurance consist of:

- A) mandatory, public, insurance component (based on mandatory contributions and defined benefit) represented by the first tier governed by the Act on Social Insurance,<sup>119</sup>
- B) mandatory/voluntary, saving component representing the second tier governed by the Act on Old-age Pension Saving,<sup>120</sup> and;
- C) voluntary, private, saving, supplementary component representing the third tier governed by the Act on Supplementary Pension Saving.<sup>121</sup>

### I. Directive 79/7/EEC

#### a) General scope of the Directive

1. The scope of social insurance according to the **Act on Social Insurance**<sup>122</sup> is:

**a) sickness insurance** - in case of loss or decrease of income from job and to make sure for an income due to temporary incapacity for work, pregnancy and maternity. From the sickness insurance system are provided:

- sickness benefits,
- nursing benefits,
- settlement benefit,
- maternity benefits

#### b) pension insurance

**old-age insurance** - to make sure for an income in old age and in case of death. From the old age insurance system are provided:

- old-age pension,
- early old-age pension,

<sup>119</sup> Act no. 461/2003 Coll. of 30 October 2003, effective from 1 January 2004.

<sup>120</sup> Act no. 43/2004 Coll. of 13 January 2004, effective from 1 January 2005.

<sup>121</sup> Act no. 640/2004 Coll. of 26 October 2004, effective from 1 January 2005.

<sup>122</sup> Certain groups of professional (police corps, army, etc.) do not participate in the public system, they are covered by special occupational pension schemes.

- widow's pension and widower's pension,
- orphan's pension.

invalidity insurance - in case of decrease in ability to carry out job due to long-term adverse health condition of insured and in case of his/her death. From the invalidity insurance system are provided:

- invalidity pension,
- widow's pension and widower's pension,
- orphan's pension.

**c) accident insurance** - in case of damaging to health or demise due to a working accident, service accident (hereinafter referred to only as 'working accident') and occupational disease. From the old age insurance system are provided:

- injuries bonus,
- injuries annuity,
- one-off settlement,
- survivors' injuries annuity,
- one-off indemnification,
- working rehabilitation and rehabilitation benefit,
- retraining and retraining benefit,
- compensation for injuries and compensation for aggravation of social expediency,
- compensation of costs related to treatment,
- compensation of expenses related to funeral.

**d) guarantee insurance** - in case of insolvency of employer to meet claims of employee, From the guarantee insurance system is provided:

- benefit of guarantee insurance

**e) unemployment insurance** - in case of losing income of employee's activities due to unemployment and to make sure for an income due to unemployment

From the unemployment insurance system is provided:

- unemployment benefit

According to the **Act on Old-Age Pension Saving** old-age saving is saving on a personal account of a saver. The aim of the saving is, together with the old-age insurance according to the Law on Social Insurance, to provide the saver with income in old age, and also to provide saver's survivors with income in case of his or her death. The law distinguishes between:

- old pension,
- early old pension,
- survivors' pension.

Some provisions of the Act on Assistance in Material Distress<sup>123</sup> and Act on Social Assistance<sup>124</sup> could be considered as laying down conditions social assistance schemes according to Article 3 (1) (b) of Directive 79/7/EEC in Slovakia. The aim of the act is to assistance in material and social distress or disability by providing social assistance benefits:

3. There are no such exclusions from receiving benefits in Slovakia.

4. The personal scope of mandatory social insurance is rather narrow according the new Act on social Insurance:

- the family members are excluded from sickness benefits,
- pension schemes now does not recognize separate group of 'cooperating persons' which are not include to the group 'employees' neither 'self-employees', which means that such persons have the legal status of voluntary insured persons,
- the minimum old age pension is not guaranteed by the law

More often women may be disadvantaged, because women can gain less from the social security system due to the facts that are commonly known – especially by the huge pay gap, by more frequent breaks in women's careers due to child-care and family duties, by more frequent unemployment and performance of part-time work by women than is the case of men and more. Very often women have no money to contribute to the social insurance schemes as 'voluntary insured person'.

5. The main reason for gender disparities in expecting pension's benefits is the gender income gap, which should remain the primary aim of all strategies for women empowerment and equal treatment. It is an aim going far below the measures necessary for gender-sensitive pension's reform and remains the most important and difficult problem to solve, because of the necessity of structural social changes, existing gender stereotypes and patriarchal society attitude. Despite of

<sup>123</sup> Act no. 599/2003 Coll. of 11 November 2003, effective from 1 January 2004.

<sup>124</sup> Act no. 195/1998 Coll. of 19 May 1998, effective from 1 July 1998.

all legal anti-discriminatory regulations, the gender disparity at the labour market will exist as long as the traditional family household responsibilities divided into the private sphere appointed to women and public sphere with the male dominance will exist.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. Slovakia has introduced the principle of gender equality in relation to the family benefits and survivors' benefits.
2. The Act on social Insurance prolonged retirement age for 62 years with no regard to the sex of the insured person. The act still contains provisions which excluded gender equality in relation to determination of pensionable age. These diversified old pension ages with pension limits being lower than 62 years are a result of previously distinctive determination of the old age pension. Until the end of 2003, each person was entitled to an old age pension after minimum of 25 years of work and attaining minimum age - men 60, women 53-57 years of age depending on the number of raised children. The equalization of the currently diversified statutory retirement age is gradual.
3. While public opinion on this issue particularly among women still favors an earlier retirement age for women, support for equalizing the ages is growing. Thus, public education is needed to bring home the point that keeping the old system under new conditions would be highly disadvantageous for women. Furthermore, it is also necessary to ensure that enough jobs are available for elderly women, which is not the case in the present situation. Already today, elderly women have difficulties to remain employed or to find a job. If a high proportion of elderly women will stay unemployed and live from social security income, the equalization of retirement age will not improve the situation of the state budget, neither woman's pension fund. Besides, further analysis is needed to assess how the raising of women's pension age will influence the social net of families which is still rather strong in Slovakia. Particularly the childcare provided by elderly women to their grandchildren allows in many cases for younger generation of women to enter the labour market. If this 'family services' will not be possible and available anymore, it is necessary to ensure enough affordable child care services.

As some kind of exclusions where women are treated differently from men we could consider the maternity leave benefit and compensatory benefit for pregnant women or mother of new born child who were moved to a different work. This benefits only applies to women in employment relationship, not to self-employed women. A person other than a mother is entitled to maternity leave benefit very exceptionally, and the entitlement is never cumulative with a benefit of mother.

4. Such exclusions are acceptable.

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. In Slovakia, there is not possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship). The social insurance system does not contain a specific regulation of occupational social security schemes.

Some provisions of the Act on Supplementary Pension Insurance, however, could be considered as laying down conditions for occupational social security schemes.

**The Act on Supplementary Pension Saving** regulates the third tier of the pension system in Slovakia. The aim of this act is to enable an insured person to gain an additional pension income in old age or during invalidity and to enable his or her survivors to gain an additional pension income for case of death of the insured person. Participation of an employer and employees in this system of pension insurance and the level of the contributions of the employee can be agreed on in a collective agreement.

3. In this pillar are used actuarial factors
4. Defined-contribution-schemes are prevailing in Slovakia.
5. The pension reform is based on a gradual equalization of the currently diversified statutory retirement age from initial 60 years for men and 53-57 for women to 62 years for both genders. All men are retired at the age of 62 since 2006 and all women will retire at the same age since 2015.

### III. The three pillar system as a whole

1. In Slovakia the three pillar system was modified by a pension reform during the year 2004. In comparison with other member states the Slovak system is very liberal. On one side it increased the degree of merit-based rewording and the insurance system, on other side the principle of solidarity and universality was rather eliminated.

2. The pillar-based approach could be conducive to gender equality, whether concrete legislation of member state would be based on gender analysis and the whole situation of women would improve.

## SLOVENIA

*Tanja Koderman Sever*

### I Directive 79/7/EEC

#### a) General scope of the Directive

1. The following social insurance schemes with below mentioned benefits are considered as being part of the first pillar:

a) Compulsory Health Insurance Scheme (regulated by the Health Protection and Health Insurance Act)<sup>125</sup>

Compulsory health insurance comprises of insurance in the case of illness or injury outside the work, and insurance in the case of injury at work as well as occupational diseases.

To the insured persons the following rights are guaranteed to the extent defined by the statute:

- right to health care services (which comprises services at the primary health care level, including dentistry, health care services in certain types of social care institutions, specialist out-patient services, hospital and tertiary level services. It also encompasses the right to health resort treatment, rehabilitation treatment, transport by ambulance and other vehicles, medicaments, technical aids and several other rights);
- right to the financial compensation (which comprises the compensation for lost salary during temporary absence from work; funeral and death allowances; reimbursement of travel expenses related to implementation of health care services).

b) Compulsory Pension and Invalidation Insurance Scheme (regulated by the Pension and Invalidation Insurance Act)<sup>126</sup>

Compulsory pension and invalidity insurance guarantees the rights to insured persons in the case of: old age, invalidity, physical impairment and the need for constant assistance and attendance.

The rights provided by the compulsory pension and invalidity insurance are:

- for risks of old age: right to an old-age pension and a partial pension;
- for risks of invalidity: right to an invalidity pension, right to occupational rehabilitation, right to reassignment and part-time work, right to a partial invalidity pension, right to invalidity benefit and right to travel allowance;
- for risks of physical impairment: disability allowance;
- for risks of constant assistance and attendance: assistance and attendance allowance.
- pension support allowance for retired persons whose pension is under the regulated minimum in order to secure their social security;
- right to holiday bonus or right to lump-sum yearly bonus for all retired persons.

c) Compulsory Supplementary Pension Insurance Scheme (regulated by the Pension and Invalidation Insurance Act)

Compulsory supplementary pension insurance means a collection of contributions from the employers in order to secure, out of the accrued funds, the right to occupational pension and other rights to be enjoyed by the insured persons performing particularly hard work and work harmful to health, and insured persons performing professional activities which cannot be successfully performed after attaining a certain age.

The rights provided by the compulsory supplementary pension insurance are:

- right to occupational pension;

<sup>125</sup> *Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju*, ZZVZZ-UPB), *Uradni list RS*, no. 100/05.

<sup>126</sup> *Zakon o pokojninskem in invalidskem zavarovanju*

([http://www.mdds.gov.si/si/zakonodaja\\_in\\_dokumenti/veljavni\\_predpisi/zakon\\_o\\_pokojninskem\\_in\\_invalidskem\\_zavarovanju](http://www.mdds.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/zakon_o_pokojninskem_in_invalidskem_zavarovanju)), ZPIZ-1-UPB4, *Uradni list RS*, no. 109/2006.

- right to reduced occupational pension.

d) Unemployment Insurance Scheme (regulated by the Employment and Unemployment Insurance Act).<sup>127</sup>

The rights arising from insurance against unemployment shall be as follows:

- cash benefit;
- transport and removal costs reimbursement;
- right to health care and to pension and disability insurance.

e) Social Assistance Scheme (regulated by the Social Security Act)<sup>128</sup>

Social assistance scheme is of a subsidiary nature.

Social security activities comprise of:

- social welfare services and measures for the prevention of and solution to social problems of individuals, families and groups of citizens (first social aid, personal assistance and assistance to families, institutional care, guidance and care and employment under special conditions and assistance to workers in companies, institutes and other employers);
- social welfare benefit.

In connection with the social assistance I need to mention the right to a state pension. A state pension is granted to a person with permanent residence in the Republic of Slovenia at the age of 65, if she/he has been residing in the Republic of Slovenia for at least 30 years between the age of 15 and 65 and is not entitled to any other pension whatsoever and whose own income does not exceed the income ceiling for entitlement to the pension support allowance. Although it is regulated by the Pension and Invalidity Insurance Act it is not a right deriving from the compulsory or voluntary pension and invalidity insurance. It is a special social security right, granted regardless of the number of years of the pension qualification period completed.

2. In compulsory health insurance scheme virtually entire population is included. On 30 September 2006 approximately 98.88 % of the Slovenian population (1,984,043 persons) was included.

In compulsory pension and invalidity insurance scheme approximately 43 % of the Slovenian population was included in December 2006 (865,249 persons).

In compulsory supplementary pension insurance scheme approximately 4 % of persons covered by obligatory pension and invalidity insurance scheme was included in February 2007 (35,542) or 1.7 % of the entire population.

In unemployment insurance scheme approximately 37 % of the Slovenian population (749,227 persons who have an employment relationship) was included in December 2006 and an statistically undetermined percentage of self-employed persons who can be insured on a voluntary basis.

3. The most frequent reasons for exclusion of people from receiving benefits from compulsory pension and invalidity insurance scheme although they fall within the scope of Directive 79/7/EEC are:

- period of inclusion in the pension and invalidity insurance is too short;
- people were working or were employed illegally;
- workers were employed, but contributions for compulsory insurance from the salary of the insured person were neither paid nor calculated by employers.

The most frequent reasons for exclusion of people from receiving benefits from compulsory unemployment insurance scheme although they fall within the scope of Directive 79/7/EEC are:

- period of employment or period of voluntary insurance is too short;
- people were working or were employed illegally.

4. Women are excluded from benefits especially in the area of pension and invalidity insurance. Namely, the period of inclusion in the pension and invalidity insurance is too short because they stayed at home in order to bring up their children or to care for elderly members of their families.

From more generous benefits they are excluded indirectly in the area of pension and invalidity insurance and unemployment insurance.

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<sup>127</sup> Zakon o zaposlovanju in zavarovanju za primer brezposelnosti

([http://www.mddsz.gov.si/si/zakonodaja\\_in\\_dokumenti/veljavni\\_predpisi/zakon\\_o\\_zaposlovanju\\_in\\_zavarovanju\\_za\\_primer\\_brezposelnosti](http://www.mddsz.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/zakon_o_zaposlovanju_in_zavarovanju_za_primer_brezposelnosti)), ZZZPB-UPB1, Uradni list RS, no. 107/2006.

<sup>128</sup> Zakon o socialnem varstvu, ZSV-UPB2, Uradni list RS no. 3/2007.

Since the majority of benefits depend on the amount of worker's salary (composed from a basic salary, performance-related bonuses and other bonuses and benefits connected with the basic salary) they get less generous benefits because they earn less than their male fellow-workers.

5. The situation could be amended with:

- raising awareness of women about importance of completion of the pension qualifying period for acquisition of the majority of benefits deriving from pension and invalidity insurance;
- raising awareness of women on their right to be insured on a voluntary basis;
- stronger efforts to decrease or eliminate gender pay gap.

**b) The exclusions mentioned in Article 3 (2) And Article 7 (1) of the Directive 79/7/EEC**

1. Slovenia has also introduced the principle of gender equality in relation to family and survival benefits.<sup>129</sup>
2. According to Article 7/1 of Directive 79/7/EEC Slovenia excluded gender equality in relation to:
  - determination of pensionable age and completion of the pension qualifying period (there are differences as regards minimum conditions for acquisition of the entitlement to an old-age pension;<sup>130</sup> retirement age which can be lowered by virtue of having children;<sup>131</sup> acquisition of the entitlement to pension with pension qualifying period longer than full years of service,<sup>132</sup> determination of full retirement age,<sup>133</sup> conditions for acquisition of the entitlement to an old-age pension not being subjected to reduction for insured persons with full years of service;<sup>134</sup> conditions for retirement of individual categories of the insured under more favourable conditions according to special regulations,<sup>135</sup> conditions for acquisition of invalidity pension;<sup>136</sup>
  - determination of percentage for acquisition of the entitlement to an old-age pension<sup>137</sup> and invalidity pension;<sup>138</sup>
  - lowering the retirement age limit for the retiring person to a certain defined age for each born or adopted child with the citizenship of the Republic of Slovenia, if the insured person cared for the child for at least five years.<sup>139</sup> The parents shall mutually agree which of them shall assert the lowering. If no agreement is reached, the parent who, for the predominant part, benefited from his/her right to the parental leave shall be the one entitled to the lowering of the retirement age limit. If none of the parents claimed his/her right to the parental leave or each of them has claimed it, it is the insured woman who shall be entitled to the lowering of the retirement age limit;
  - taking into consideration the period of time under compulsory insurance, in which an insured person was employed part-time due to the time devoted to care of his child up to the age of three, or due to care of a person with a serious physical impairment or a moderately, seriously or severely mentally handicapped person in accordance with the regulations governing the rights related to parenthood, as the period of full-time employment;
  - inclusion of periods of unemployment in the insurance period (these are periods of child care in the first year of age, prior to the enactment of the ZPIZ-1, if mother or father was not insured on any other basis, provided that the child had nationality of the Republic of Slovenia during that period and that his permanent residence was in the Republic of Slovenia; period of absence from work due to a temporary incapacity for work or a parental leave following the termination of employment or another relationship).
  - taking into account time when an insured person or a pension recipient was not covered by insurance due to the care and attendance provided to his child under three years of age for the completion of the pension qualifying period conditions and the assessment of a pension if he/she has paid compulsory insurance contributions.<sup>140</sup>

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<sup>129</sup> As regards survival benefits there are still few differences with regard to the age limit required for acquisition of survival pension of parents and a widow in transitional period under Articles 421/2, 425 and 426 of ZPIZ-1. However, in 2015 the conditions will be equal for women and men.

<sup>130</sup> Article 36 of the ZPIZ-1.

<sup>131</sup> Article 37/3 of the ZPIZ-1.

<sup>132</sup> Article 51/1,3 of the ZPIZ-1.

<sup>133</sup> Article 52 of the ZPIZ-1.

<sup>134</sup> Article 54 of the ZPIZ-1.

<sup>135</sup> Article 154 of the ZPIZ-1.

<sup>136</sup> Article 67 of the ZPIZ-1.

<sup>137</sup> Article 50/1 of the ZPIZ-1.

<sup>138</sup> Articles 74 and 75 of the ZPIZ-1.

<sup>139</sup> Articles 37 and 54 of the ZPIZ-1.

<sup>140</sup> Article 198/1 of the ZPIZ-1.

3. Women are treated differently only in the area of compulsory pension and invalidity insurance scheme.

Exclusions with regard to:

- persons who have brought up children;
  - benefit entitlements following periods of interruption of employment due to bringing up children;
  - completion of the pension qualifying period,
- present compensation for the problem with reconciliation of work and private life which mostly affects women (slovenian women still spend twice as much time as men performing household chores and taking care of the family) and is in fact one of the most important conditions for the implementation of equal opportunities for women and men in the society, particularly in the employment and labour market.

On the other hand, they can also stimulate parents to interrupt employment due to bringing up children which is of a huge importance (especially during the first three years) for children.

4. In my opinion the majority of exclusions should not be repealed because women are still far from being formally equal. On the other hand, repeal of differences in determination of pensionable age and determination of percentage for acquisition of the entitlement to an old-age pension and invalidity pension can be reconsidered because there is no reason for distinction.

## **II Directive 86/378/EEC as amended by Directive 96/97/EC**

1. Yes. It is always possible to distinguish between statutory pension schemes (compulsory pension and invalidity insurance scheme on the basis of intergenerational solidarity and compulsory supplementary pension insurance scheme) and occupational pension schemes (collective supplementary pension insurance scheme). Though, I must mention that naming of above mentioned schemes is a bit confusing (there are three different supplementary pension insurance schemes, each of them addressing a different pillar).
2. In collective supplementary pension insurance scheme 428,388 of persons were included (which is 49.76 % of all persons covered by obligatory pension and invalidity insurance scheme). There is unfortunately no gender-desegregated data on this topic.
3. In Slovenian system of collective supplementary pension insurance scheme contributions of employees and as well employers are the same. There is also a provision in the Pension and Invalidity Insurance Act<sup>141</sup> which provides that the conditions for the acquisition of rights under voluntary supplementary insurance shall not differ in respect of gender of the insured person.

Unfortunately, above mentioned rule does not apply to the method of calculation of the amount of the supplementary pension.

Namely, supplementary pension under collective supplementary pension insurance scheme is calculated with the application of adequate actuarial calculation which considers life expectancy of the insured person on the basis of adequate mortality tables. Taking into account higher life expectancy of women the amount of the the supplementary pension paid is lower for women than man.

4. In Slovenia the defined-contribution scheme is prevailing.
5. This situation has not occurred in Slovenia. Therefore no equalizing law has to be adopted.

## **III The three pillar system as a whole**

1. Yes it is.
2. I think that three pillar-based approach is appropriate to attain gender equality.

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<sup>141</sup> Article 294/2 of the ZPIZ-1.



## SPAIN

Berta Valdes

### I. Directive 79/7/EEC

#### a) General scope of the Directive

*1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.*

The first pillar of the Social Security system is integrated, in first place, by a wide range of contributive benefits that include both, the general and the special social security schemes.<sup>142</sup> In second place, there is another range of non contributive benefits that complement the general contributive scheme. Nevertheless its technique is assistive and aims to complement or to widen the contributive benefits; they are part of the Social Security system. The Social Security system is configured like a function of the State that includes not only the contributive benefits, but also the non-contributive that are, therefore, considered as included in the first pillar covered by the Directive 79/7/EEC.

The protection provided by the special schemes varies in relation to the general social security scheme, either in the risks covered or in benefits. The difference sometimes implies a weakness in protection, and others, the special scheme implies a greater indulgence in the privileges. The different level of protection of citizens has been considered, by the Constitutional Court, in accordance with the principle of equality and non-discrimination, because the benefits come from different schemes, each with its own rules.

The coverage of the general scheme of the social security system, in its contributive modality, is the next:

- a) Medical care in cases of maternity, occupational and non- occupational disease, occupational and non-occupational accidents.
- b) Economic benefits in cases of temporary disability
- c) Economic benefits in case of maternity
- d) Economic benefits in case of paternity
- e) Economic benefits in case of risk during pregnancy
- f) Economic benefits in case of risk during the breast-feed period
- g) Economic benefits in case of disability
- h) Economic benefits in case of retirement
- i) Economic benefits in case of unemployment
- j) In case of death, several survivors benefits
- k) Family benefits: in case of birth of the third and successive sons, multiple childbirths.

The coverage of the social security general scheme, in its non-contributory modality comprises:

- a) Economic benefits in case of disability
- b) Economic benefits in case of retirement
- c) Economic benefits in case of unemployment
- d) Family benefits

The autonomous communities also have competences in social work activities and in some of them a subsidy for labour insertion (minimum income for labour insertion) and old age benefits have been introduced.

*2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?*

People covered by the Social Security system with regard to the contributory benefits, are the Spanish with residence in Spain or the foreigners with legal residence in Spain that are: employed, self-employed, students or civil servants. On the other hand, the beneficiaries of the non-contributory economic benefits are the Spanish with residence in the country that are in state of necessity.

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<sup>142</sup> The social security schemes are: special scheme for agricultural workers, special scheme for seafarers, self employed workers, domestic servants, mine workers.

Statistical data with regard to the covered population by the Social Security system (data of the contributory benefits of the general scheme of the Social Security), published by the Ministry of Labour and Social Affairs in February 2007, are the next:

1. Permanent invalidity benefit:	879,683
2. Retirement:	4,839,445
3. Widowhood:	2,213,317
4. Orphan benefit:	258,664
5. Family benefit:	38,482

The total amount of benefits is 8,229,591. The working population in the same date is 14,337,473, of which 8,301,831 are men and 6,035,554 women.

From 8,229,591 of benefits, 4,015,456 are for men, with an average amount of 832.75 euro; 4,213,407 are for women, with an average amount of 514.17 euro; gender is not specified in 728 benefits.

*3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?*

Workers with an apprenticeship contract have a limited social protection because unemployment benefits are excluded for them. This exclusion affects an important group of workers that can be hired with this type of contract: young people between 16 and 21 years old without a high school or university degree.

This age limit was not applied until the RD-L 5/2006, for some collectives like unemployed workers with more than three years of labour inactivity; this measure affected a lot of women.

*4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits? How could this situation be amended?*

The subjective requirements for the inclusion in the agricultural workers' special scheme<sup>143</sup> may lead to indirect discrimination situations. If agricultural work is done regularly and constitutes the fundamental income for the worker, he will be included in this scheme. Nevertheless, the earned income from agricultural activity will not be considered as the fundamental support if the spouse is the head of a business or industry. When a woman works in the agricultural exploitation will be excluded of the social protection, unless she demonstrates the income from agricultural activity is higher than her husband's income. As a matter of fact, women participation in the household budget normally is lower than men's, and the rule described above –neutral in its formulation- may imply an indirect discrimination and lack of protection of women. One way to change this situation might be to interpret that the requirement of the 'agricultural work as the fundamental income for the worker' operates taking into account the individual economic situation. The requirement could be understood as fulfilled when incomes earned are sufficient to cover personal needs, without the presumption that they are not the main support when the spouse works in a different business or industry.

The protection offered by some benefits of the domestic workers special scheme results sensibly lower than that provided by the Social Security general scheme.

This is the case with the economic benefits for temporary disability, which are perceived 29 days after the beginning of the leave. In the general scheme this benefit is perceived 16 days after (for non-occupational accident and non-occupational disease). Occupational diseases and unemployment are not covered either. This situation creates an indirect discrimination because the vast majority of workers covered by this scheme are women.

Part time work is one of the fields where situations of indirect discrimination of women are hidden, having as result, the possibility of their exclusion or the perception of lower social security benefits. The proportionality criterion strictly applied to part time contracts to calculate the mandatory waiting period to receive the social security benefits leads to a disproportionate result, because it excludes the worker from the benefit. This situation was studied by the Constitutional Court in its judgment 253/2004, which declared not in conformity with the Constitution the exclusive computation of working hours to determine the contributions of the Social Security benefits. At present, the norm has been modified and the equivalence of worked hours should be calculated in theoretical contribution days.

This situation affects predominantly women, which constitutes an indirect discrimination. But the problem remains because lower benefits are in force.

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<sup>143</sup> This special scheme is in process of reform.

The reduction of the benefit, which can be justified in the contributive nature of the Social Security system, is not in accordance with the equality and non-discrimination principle when the motive of the reduction of the working time is to take care of a son under six years old. The legislator has not taken into consideration all the possible consequences of the working time reduction in social protection. A rule that implies a worse effect for the worker derived from the exercise of the right, is not in accordance with the Constitution.

**b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

*1. Art. 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?*

Both family benefits and survivors' benefits are ruled under the principle of gender equality. At present, marriages of people of the same sex have the same social protection rights than marriages of heterosexuals.

*2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages etc mentioned in Art. 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.*

Spain has not used the possibility of excluding gender equality as mentioned in Article 7 (1.a) and Article 7 (1.d), as the pensionable age is the same for men and women, and the increasing of benefits for dependent spouses are also conceded for both men and women. Referring to Article 7 (1.b), there are no specific or extra benefits entitled to persons in old-age pension for having brought up children. Old-age and invalidity benefits are not derived from a third person (a wife), as it is a personal entitlement (Article 7 (1.c)).

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

*1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?*

Occupational pension schemes are private, free and voluntary, usually established through an agreement in collective bargaining, and totally excluded from the Social Security system (which is public and compulsory). Therefore it is possible to distinguish between them.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

The workers covered in the year 2005<sup>144</sup> by social complementary benefits and integrated in the second pillar are 3,524,424.<sup>145</sup> There are no disaggregated data by gender but the percentage men/women could be applied.<sup>146</sup>

*3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employee's contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined benefit scheme the employer makes sure that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).*

<sup>144</sup> The last official data are from 2005. The memory of the year 2006 is not available yet.

<sup>145</sup> The figure of 3,524,424 covered workers corresponds to: 1,551,859 workers that have an employment plan; 189,120 workers in Spanish mutual benefit societies of social welfare; 327,500 workers in Basque Country mutual benefit societies of social welfare and 1,455,945 workers with insurance contract. The collective insurance contracts that agree private pensions are a total of 4,853,153, of which around 30 % correspond to retirement (being the 30% of 4,853,153 = 1,455,945).

<sup>146</sup> Wage-earning population in February 2007 is 14,337,473 people, of which 8,301,831 are men and 6,035,554 are women. Approximately 57.9 % men and 42.09 % women. The application of these percentages to the number of workers covered by the second pillar shows an approximate figure, not real (data of the wage-earning population are from February 2007, but the information about the individuals covered by the complementary social protection of the second pillar is from December 2005).

In general, the actuarial method is used as the rule, but only the gender of the person is taken into account and acts as the criterion when we deal with the defined-benefit scheme for an ensured annuity. The gender is not taken into consideration for the defined-contribution scheme, which in the long run, at the very instance to calculate the retirement benefit, will entail a lower economic benefit for women because of their higher life expectancy. In Spain the percentage of defined-contribution scheme is much higher than the defined-benefit scheme. On externalizing the pension obligations of the enterprises, the trend of the last 15-20 years has been to transform the defined-benefit scheme in defined-contribution scheme when employment plans are agreed.

The collective insurances are 100% defined-benefit schemes where the actuarial method is applied and the gender of the person is taken into consideration, but from this 100% only 28-30% are ensured annuities.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

The tendency prevailing is defined-contribution-schemes

*5. Due to new jurisdiction as regards pensions of officials [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of "old" pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?*

In Spain the retirement age has been always the same for men and women.

### **III. The three pillar system as a whole**

*1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?*

Not for Spain. The Social Security system is clearly integrated, with the contributive and non contributive branch, in the first pillar, meanwhile the complementary social protection is not Social Security and is integrated in the second and third pillar. But the relevant distinction is between Social Security and the protection which is not Social Security, and for that there is not a problem.

*2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?*

More conducive than hindrance.

## **SWEDEN**

*Ann Numhauser-Henning*

### **I. Directive 79/7/EEC**

#### **a) General scope of the Directive**

1. Parts of the general social security system in Sweden covered, in accordance with Article 3.1 of Directive 79/7/EEC, are sickness and invalidity benefits regulated by the 1962 Public Insurance Act (*Lag 1962:381 om allmän försäkring*), accidents at work and occupational diseases benefits regulated by the 1976 Act on Work Injury Insurance (*Lag 1976:380 om arbetsskadeförsäkring*), unemployment benefits regulated by the 1997 Unemployment Insurance Act (*Lag 1997:238 om arbetslöshetsförsäkring*) and old-age benefits regulated by the 1998 Act on Earnings-Related Pension (*Lagen 1998:674 om inkomstgrundad pension*) and the 1998 Act on Guaranteed Pension (*Lag 1998:702 om garantipension*), respectively. Article 3.1 of Directive 79/7/EEC also covers the 2000 Act on Survivors' Pensions (*Lag 2000:461 om efterlevandepension och efterlevandestöd*). Old age benefits are supplemented, in accordance to Article 3.1.b of Directive 79/7/EEC, by the 2001 Act on Elderly Income Support Benefit (*Lag 2001:853 om äldreförsörjningsstöd*).

2. The scope of the Swedish social security system is laid down by the 1999 Social Security Act (*Socialförsäkringslagen 1999:799*). This act divides the social security system into two parts. One part is 'work-based' and governed by the principle of replacement of lost earnings. The other part is residence-based. The Act lists the benefits belonging to each part of the system. The dividing line corresponds largely to the difference between contributory and non-contributory benefits in other social security systems.

A person who performs work in Sweden is affiliated to the work-based part of the social security system irrespective of the place of residence (*lex loci laboris*).<sup>147</sup> Such a person continues to be affiliated with the Swedish system for benefits which are based on previous work in Sweden, even if she/he moves abroad (exportability of pensions and work injury benefits). The insurance continues to apply as long as the person is gainfully employed in the country and during a 'post protection period' of three months (Chapter 3 Article 6). If the claimant at the end of this period receives a work-related benefit, the work-related part of the social security system continues to apply as long as the benefit is awarded. The work-related part of the insurance may also, pursuant to governmental regulations, continue to apply during certain other periods, for instance education periods and child care periods. Insurance for pensions and work injury benefits is always applicable when entitlement to benefit is based on work performed in the country (Chapter 3 Article 8). The same rule applies to work-related parental benefit.

These generous rules on the duration of insurance in the work-related part of the system are rooted in domestic rules on the calculation of sickness benefit and parental benefit. A certain level of sickness benefit once obtained can be maintained even during periods with lower earnings or no earnings at all, for instance unemployment periods or childcare periods, in case the insured person falls ill or a new child is born during such a period. That is why the work-related part of the insurance must continue to apply during these periods. But these rules may also have consequences on the amount of time Sweden remains the competent state for a person who moves to another Member State.

The new Social Security Act contains a special chapter on the exportability of social security benefits. Sickness benefit and other similar short-term, work-based benefits are not exportable (Chapter 4 Article 5). Pensions and work injury benefits are exportable to all foreign countries. Work-related parental benefit is also exportable to a parent in another country, but there is a residence condition with regard to the child. The child must reside in Sweden (Chapter 4 Article 6 of the Social Security Act).

Benefits, which are not subject to previous work and do not replace lost earnings, will remain residence-related even under the new Act. They are granted to residents only, not to workers performing work in the country without being residents, and they are not exportable to persons who take up residence in another country. The residence-based benefits can be divided into three main groups:

- a) benefits which are normally earnings-related but awarded at a 'guaranteed level' to persons without the necessary work record (sickness- and parental benefit, invalidity benefit at guaranteed level and the new guaranteed pension as well as survivors' pensions at guaranteed level);
- b) general health and medical care and some special sickness benefits in kind for severely disabled persons;
- c) benefits for children.

Only the benefits under a) above are of interest to this report. We can now add to this list the new *Elderly Income Support Benefit Act (Äldreförsörjningsstöd 2001:853)*, which is a means-tested and residence-based benefit designed to complement general statutory pension schemes.

In this area, national legislation is still based on the principle of residence. There is a provision on exportability of residence-related benefits implying that all residence-related benefits in cash will continue to be payable during a temporary stay in another EEA country (Chapter 4 Article 1 e contrario).

As regards the Swedish concept of residence the decisive element is the place where the claimant actually lives, i.e. the location of the house or the flat where he/she sleeps at night. The decisive element for a newly arrived person is their anticipated stay in the country.

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<sup>147</sup> The personal scope of Swedish social security law has traditionally been linked to residence and to a lesser degree to nationality. The Swedish social security system has been classified as residence-based, in contrast to the continental work-based system. This is a misunderstanding. The main part of the Swedish social security system is - and was - work-based and the most prominent principle is the principle of replacement of lost earnings.

If their presence in the country is likely to last more than one year, the person concerned will be registered as a resident in the country from the first day and therefore will be entitled to residence-based benefits. Correspondingly, a person who leaves the country but does not intend to stay away more than one year is still regarded as a resident. If the anticipated stay abroad is likely to last more than one year, the person ceases to be a resident as soon as he/she leaves the country.

Sickness-benefits and accidents at work/occupational diseases benefits are work-related and cover those in gainful employment – whether employed or self-employed. This goes also for invalidity benefits, earnings-related pensions and unemployment benefits as well. The Swedish rate of gainful employment is comparatively high or 79.7 % among men and 75.7 % among women ages 16-64 in 2004 (Statistical yearbook of Sweden 2006).

Old-age and survivors' pensions and invalidity benefits on the other hand have a residence-based guarantee-level and thus apply to a 100 % of the people resident in Sweden in the relevant age-groups. This is also true with regard to the Elderly Income Support Benefit.

3. The right to *sickness benefits* is dependant on an income – through employment or self-employment – of no less than 24 % of the so-called yearly basic amount being 40,300 SEK in 2007 (100 %, approx. 3,627 euro) a year.

Incomes below 42.3 % of the yearly basic amount a year does not give a right to *earnings-related pension*, whether in the form of old-age, invalidity, work accidents/occupational diseases or survivors' pension.

The right to *unemployment benefits* is dependant of a so-called work-requirement: during the last 12 months prior to unemployment the claimant must have been working at least 80 hours a month during six months time, or have been working at least 480 hours in total during a six months period with no less than 50 hours each month.

4. Formally, there are no exceptions for women in any of the covered schemes as regard access or application (see however, below on survivors' pensions). Indirectly, however, the special requirements to be covered by the scheme in question may be argued to have a disparate impact. The yearly income requirement for sickness benefits as well as earnings-related pensions is quite low and, to my opinion, does not give room for much speculation as regards disparate impact. The work-requirement for unemployment benefits was recently changed, however, from a minimum of 60 hours a month to now 80 hours a month. The Salaried Employees' Organisation (TCO) has announced the Swedish Government to the Commission on this issue, claiming it to amount to indirect discrimination of women, working short part-time to a considerably higher extent than men.

As regard survivors' pension this is now mainly available as child-pension for minors and 'transitional pension' (*omställningspension*) for surviving spouses regardless of sex - the 2000 Act on Survivors' Pensions (*Lag 2000:461 om efterlevandepension och efterlevandestöd*). A special right only for women to a widow's pension still apply, though, according to Chapter 6 in the 2000 Act. This apply only to women born 1944 or earlier and married to the deceased in 1989 or earlier *and* at the time of death having been married for a minimum of five years. An additional requirement is that the marriage must have been entered into before the deceased was 60 years of age *or* that there are common children. Also women born 1945 or later may be covered if they already in 1989 had been married with the deceased for five years having entered into marriage before the man had the age of 60 *or* had common children and one of these requirements was met also at the moment of death.

6. Generally speaking, the fact that the share of women in gainful employment is – though in Sweden not so very much – lower than the corresponding share of men does of course have a negative impact on women's share of social security altogether. This can only be amended by women increasing their general employment level, including working less part-time. Such a development is dependant on general gender attitudes in society but also on child-care facilities and the like. I will not argue further along those lines. As regards the special schemes it is especially the unemployment benefit regulation that may be criticised along the lines of TCO: the 80 hour a month minimum requirement does have a disparate impact on women working short part-time to a higher extent than men. A requirement of 80 hours a month amounts to almost half-time employment and is thus quite high. The earlier 60 hour rule was more reasonable from an equality point of view!

#### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. There are, generally speaking, no family benefits attached to other benefits such as sickness, invalidity, work accidents/occupational diseases, old age or unemployment benefits in Sweden.

In the old age income pension scheme there are gender neutral rules on benefits for child-rearing years. There are also gender neutral rules on the right to transfer pension-rights.

As regard survivors' pensions the situation was explained above under sec. 4. Survivors' pensions are now mainly available as child-pension for minors and 'transitional pension' (*omställningspension*) for surviving spouses regardless of sex - the 2000 Act on Survivors' Pensions (*Lag 2000:461 om efterlevandepension och efterlevandestöd*). The Swedish legislator can thus be said to have introduced the gender equality principle to survivors' benefits though reducing them at the same time. A special right only for women to a widow's pension still apply, though, according to Chapter 6 in the 2000 Act. These rules have a transitional character and apply only to women born 1944 or earlier and married to the deceased in 1989 or earlier *and* at the time of death having been married for a minimum of five years. An additional requirement is that the marriage must have been entered into before the deceased was 60 years of age *or* that there are common children. Also women born 1945 or later may be covered if they already in 1989 had been married with the deceased for five years having entered into marriage before the man had the age of 60 *or* had common children and one of these requirements was met also at the moment of death.

2. Swedish statutory social security legislation is formally gender neutral on all the points mentioned in Article 7.1 of the Directive 7977/EEC with the exception of the transitional rules on widows' pensions described above and a rule of an equally transitional character on additional housing benefits to the old 'folk-pension' – compare Sec. 11 the (2003:307) Ban on Discrimination Act.

3. Due to their transitional character the rules mentioned above in secs. 1 and 2 have a small and diminishing effect.

4. Due to their transitional character there is no reason, in the author's opinion, to repeal these exclusions.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. Yes it is as far as the author knows.

2. Second-pillar pension schemes are, generally speaking, based on collective agreements in Sweden and there are four main agreements/areas: the state sector (from age 28), the municipality sector (from age 28), the private salaried employees' sector (from age 28) and the private blue-collar sector (from age 21). These schemes are in practice applied to all employees in their area of application regardless of them being unionised or not or to about 90 % or more of all Swedish employees as a general estimation. The coverage in the state and municipality sector is 100 %. Also in the private sector collective-agreement coverage is high. I have no gender-desegregated data, but considering that the employment-rate among women is fairly close to the one of men and women being concentrated to the public sector with a 100 % coverage of second-pillar schemes, I do not think that there are any considerable gender-differences with regard to coverage.

The second-pillar schemes are especially important to the extensive groups of workers which have incomes above 'the ceiling' of the statutory pension scheme, i.e. 7.5 Basic amounts (one Basic amount is 40,300 SEK or approx. 3,627 euro in 2007).

3. All the four main second-pillar pension schemes mentioned above are gender-neutral when it comes to the actuarial factors used.

4. With the 1998 reform of the Statutory Social Security Pension Scheme Sweden switched from a defined-benefit scheme to a defined-contribution scheme. Following that reform the four main second-pillar pension schemes have been renegotiated and, generally speaking, adjusting to the defined-contribution model. This is true for the schemes in the private blue-collar and municipality sector, respectively. There are, however, still parts of defined-benefit elements in the two other schemes. Thus the new 2007 Private Salaried Employees' scheme is still a defined benefits scheme for those born before 1979 whereas it is a defined contributions scheme built on life-long earnings for the younger ones.

5. The applicable law is the (1991:433) Equal Opportunities Act and its rules on equal pay. This Act replaced an earlier Act from 1979 and no special amendments were made to implement the case-law referred to.

In Sweden, the general statutory Social Security Pension Scheme also before the 1998 reform applied equally to employees in the public and private sector and it was also gender neutral with regard to pensionable age and the like. This also apply to the current Statutory Pension Scheme(s). Also second-pillar occupational pension schemes are known to be gender neutral as regard pensionable age and have been so for quite some time, also before 1990 typically speaking.

### **III. The three pillar system as a whole**

1. As regards Sweden, I consider the three pillar system still to be a reasonable metaphor. No doubt, the statutory social security pension scheme – the first pillar scheme – is the most important one. Taking into account the level of collective agreement coverage (in the public sector 100 %, in the municipal sector 100 % and in the private sector about 90 %) the second-pillar schemes have an important but complementary function. This is especially true with regard to the big group of people with incomes above the statutory scheme 'ceiling' of 7.5 basic amounts (one basic amount is 40,300 SEK or approx. 3,627 euro in 2007).

A considerable share of the Swedish population also make regular contributions to a private third-pillar pension insurance/scheme.

2. I think this three-pillar approach is what society can afford for the foreseeable future. As long as women do not take part in gainful employment to the same extent as men nor have the same incomes the system as such will, of course, not further gender equality with regard to pensions. To further gender equality such a system must be complemented by rules within the schemes compensating generously for child-rearing years as well as by guaranteed basic-pension schemes!

## **UNITED KINGDOM**

*Christopher McCrudden*

### **I. Directive 79/7/EEC**

#### **(a) General provisions**

1. The following are the main relevant UK statutory provisions:

#### **Sickness**

Statutory Sick Pay (SSP) is paid to an employee working for an employer and earning enough to be relevant for National Insurance (NI) purposes (this is lower than the amount when the employee has to start paying NI contributions). SSP is paid to employees who are unable to work because of sickness. SSP is paid by the employer for up to a maximum of 28 weeks. SSP is not paid for specific illness or treatment but to all employees, who are incapable for work and who satisfy the conditions for payment.

#### **Invalidity**

A person who cannot work because of ill health or a disability may be able to claim Incapacity Benefit. This is a contributions-based benefit paid at a set rate. It gives people of working age a replacement income when they cannot work or look for work because of ill health or a disability. It can be paid based on the number of National Insurance contributions they have paid or been credited, or if they were sick or disabled when they were 16 or over but under 20 (25 if they were in education or training before age 20) may be able to claim under the youth provisions. A person who is sick or disabled as a result of service in HM Armed Forces or because of a war is eligible for a War Disablement Pension.

#### **Old age**

A State Pension is paid to entitled people who claim it having reached State Pension age. It is based on National Insurance (NI) contributions and it is made up of different elements. Depending on individual circumstances, a person may be entitled to an Additional State Pension. This is also called the State Second Pension and was formerly known as the State Earnings Related Pension Scheme or (SERPS). This is paid in addition to the basic State Pension. A State Pension will be automatically and permanently increased if the person was getting long-term Incapacity Benefit Age Addition at anytime within the period of 8 weeks ending on the day before he or she reached State Pension age. Long-term Incapacity Benefit Age Addition will be reduced if the person is getting any additional State Pension. This may mean no long-term Incapacity Benefit Age Addition is payable. The rate you get will be the same as that which is paid with your Incapacity Benefit. An Age Addition of 25p a week is paid to anyone aged 80 or over on top of their State Pension.



A Winter Fuel Payment is paid to help people aged 60 and over with the costs of keeping warm in winter. If a person is aged 60 to 79 and he or she is entitled to receive a Winter Fuel Payment, he or she will get either £100 or £200, depending on your circumstances in the qualifying week (18-24 September 2006). If the person is aged 80 or over and is entitled to a Winter Fuel Payment, he or she will get an extra £ 50 or £ 100, so a person could get up to £ 300, depending on circumstances.

### **Accidents at work and occupational diseases**

An Industrial Injuries Disablement Benefit (IIDB) is paid to people who have become disabled because of an accident at work or a disease caused by their job. It is paid whether or not the person is currently working. IIDB can also be claimed by and paid to people of state pension age in addition to those of working age. This scheme does not cover you if you were self-employed at the time of the accident or the onset of the disease. The person must normally have had the accident or got the disease in Great Britain.

If injured at work, there may be other help a person can get. A trainee who has an accident or develops a disease during the course of a workbased training programme cannot get Industrial Injuries Disablement Benefit. However, he or she may be able to get help under the Analogous Industrial Injuries Scheme. A person who cannot do their usual job or work with similar pay because of an accident or disease caused by work, and who is suffering from an illness or disability may be entitled to claim Reduced Earnings Allowance (REA). If the Reduced Earnings Allowance is £2 or more a week when the claimant reaches state pension age and the person is not in regular employment, it will be replaced by another benefit called Retirement Allowance. A person who gets Industrial Injuries Disablement Benefit at the 100% rate and needs daily care and attention may get Constant Attendance Allowance. A person in receipt of one of the two higher rates of Constant Attendance Allowance and who needs permanent, constant care and attention, may also get Exceptionally Severe Disablement Allowance.

### **Unemployment**

A Jobseeker's Allowance (JSA) is paid to people who are available for and actively looking for (seeking) work. To get benefit, a person will need to discuss, usually every 2 weeks, when he or she is available for work and what he or she is doing to find a job. If the claimant has paid enough National Insurance contributions in the past, he or she may be able to get contribution-based Jobseeker's Allowance. If income and savings are below a certain level, the person may be able to claim income-based Jobseeker's Allowance.

### **Social assistance**

If you are on a low income and any of the following apply: you are a lone parent, you are sick or disabled, you are aged 60 or over, you are caring for someone who is ill or disabled, you are registered blind may be eligible for Income Support. If a person, or his or her partner if there is one, is working but has a low income, he or she may be able to get Working Tax Credit. A person on a low income may also be able to get Housing Benefit and/or Council Tax benefit. A person may also be able to get the latter two benefits while sick and unable to work. A person in need of immediate help with day-to-day living costs or something else in an emergency may be eligible for a Social Fund Crisis Loan.

2. In order to be able to place the following statistics in context, there are various features of the UN population that are relevant:

**Population:** 60,609,153 (July 2006 est.). **Age structure:** 0-14 years: 17.5 % (male 5,417,663/female 5,161,714), 15-64 years: 66.8 % (male 20,476,571/female 19,988,959), 65 years and over: 15.8 % (male 4,087,020/female 5,477,226) (2006 est.). **Median age:** total: 39.3 years, male: 38.2 years, female: 40.4 years (2006 est.). **Sex ratio:** at birth: 1.05 male(s)/female, under 15 years: 1.05 male(s)/female, 15-64 years: 1.02 male(s)/female, 65 years and over: 0.75 male(s)/female, total population: 0.98 male(s)/female (2006 est.). **Life expectancy at birth:** total population: 78.54 years, male: 76.09 years, female: 81.13 years (2006 est.).

It is not possible to identify those that are 'covered' by the various benefits, if by that is meant who is eligible to receive the various benefits. Instead, the following statistics show those in actual receipt of these benefits.

### **Sickness/ Invalidity/Incapacity**

At August 2006, there were 2.68 million working age claimants of incapacity benefits (Incapacity Benefit or Severe Disablement Allowance), a fall of 42 thousand on a year earlier. 58 % of claimants were men and 42 % women. Both the male and female caseloads are now falling: males by 34 thousand and females by 8 thousand in the year to August 2006. At August 2006, 62 % (1.70 million) of working age claimants were beneficiaries (i.e. were paid benefit), with the remaining 986 thousand receiving National Insurance Credits only. A further 42 thousand were claimants above State Pension Age: these were almost all recipients of Severe Disablement Allowance.

### **Old age**

At August 2006, there were 11.69 million claimants of State Pension, a rise of 109 thousand on a year earlier. Of these, 38 % were male and 62% female.

### **Accidents at work and occupational diseases**

There were 340 thousand people claiming under the Industrial Injuries Disablement Benefit scheme in June 2006, of whom 61 % received Industrial Injuries Disablement Benefit only, 21 % received Reduced Earnings Allowance only, and 18% received both.

### **Unemployment**

At August 2006 the total number of Jobseeker's Allowance claimants was 931 thousand. Female claimants represented 28 % of the JSA caseload (260 thousand), while males represented 72 % (672 thousand). The total caseload has risen by 75 thousand since a year earlier.

### **Social assistance**

At August 2006 the total number of Income Support (IS) claimants was 2.13 million. Claimants of incapacity benefits represented 56% of the IS caseload (1.19 million). Lone Parents (all single claimants with dependants excluding claimants of incapacity benefits) represented 37% of the IS caseload (783 thousand), while Carers and Others represented 7% of the caseload (157 thousand). At August 2006 there were 4.02 million recipients of Housing Benefit. At August 2006 there were 5.09 million recipients of Council Tax Benefit (figure excludes second adult rebates), of whom 2.50 million were aged 60 and over.

3. The main reasons to exclude people from receiving benefits include low pay, irregular employment, self-employment, and failure to reach the statutory state pension age, as can be seen from the following illustrative examples of particular benefits:

### **Statutory sick pay**

To get SSP you must be: aged between 16 or over and under 65 (these age limits will be removed from 1 October 2006); sick for at least 4 or more days in a row (including weekends and bank holidays); earning, before tax and National Insurance an average of £84.00 a week. This is called the Lower Earnings Limit for National Insurance Contributions (NIC). The amount you need to earn is lower than the amount when you have to start paying NIC's.

### **Incapacity benefit**

Unless you are claiming under the youth provisions, in order to receive Incapacity Benefit, you must have a certain amount of qualifying earnings. Qualifying earnings are earnings on which you pay or are treated as paying National Insurance contributions. If you work for an employer, the level of earnings at which you start to pay National Insurance is known as the employee's primary threshold. If you are self-employed you must pay National Insurance unless you have been given an exception.

### **State pension**

The State Pension age for men is 65 and is between 60 and 65 for women. In addition, the husband or wife or civil partner must have paid or been credited with NI contributions. Entitlement to the basic State Pension is dependent on the number of qualifying years you have earned over your working life. Qualifying years are based on the NI contributions you have paid, been treated as having paid or been credited with during your working life.

4. As can be seen, the only area in which there is direct discrimination between men and women is in the area of the state pension age. The State Pension age for women will increase gradually from 2010, so that by 2020 it will be 65. The increase in the State Pension age will not affect women born on or before 5 April 1950.

Women born between 6 April 1950 and 5 April 1955 (inclusive) will have a State Pension age between 60 and 65. Women born on or after 6 April 1955 will have a State Pension age of 65.

**(b) Exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. Family benefits and survivors' benefits do not fall within the scope of the Directive. However, the United Kingdom has nevertheless introduced the principle of gender equality in relation to these benefits, as can be seen in the following examples:

Child Benefit is a tax-free monthly payment to anyone bringing up a child or young person. It is not affected by income or savings so most people who are bringing up a child or young person qualify for it. Child Tax Credit and Working Tax Credit help to support families with children and working people on low incomes. Child Tax Credit supports families with children, and some 16 to 18 year olds. You can claim whether or not you are in work. All families with children, with income of up to £ 58,000 a year (or up to £ 66,000 a year if there is a child under one year old), can claim the credit in the same way. Working Tax Credit supports working people (whether employed or self-employed) on low incomes by topping up earnings. None of these are paid on the basis of sex. Bereavement Benefits may be payable on the death of a husband, wife or civil partner. Whether a person is entitled will depend on the National Insurance contributions paid. The three benefits are: **Bereavement Payment** is a lump sum of £ 2,000 we pay to people who have been bereaved who qualify. **Widowed Parent's Allowance** is a weekly benefit we pay to widowed parents who qualify. **Bereavement Allowance** is a weekly benefit we pay to people who have been bereaved who qualify. These have replaced the previous sex-based survivors benefits.

2. The United Kingdom continues, as we have seen above, direct discrimination between men and women is in the area of the state pension age. This mostly affects the payment of the state pension benefits discussed above.

3. The domains in which women treated differently from men is in the area of pension benefits.

4. The State Pension age for women will increase gradually from 2010, so that by 2020 it will be 65. The increase in the State Pension age will not affect women born on or before 5 April 1950. Women born between 6 April 1950 and 5 April 1955 (inclusive) will have a State Pension age between 60 and 65. Women born on or after 6 April 1955 will have a State Pension age of 65.

**II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. We have seen above that it is not always possible to distinguish between statutory pension schemes and occupational schemes in the United Kingdom in the sense that the former have elements (particularly the second State pension which are related to pay similar to some occupational schemes.

*2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?*

Women in full-time employment have now become more likely to be a member of an occupational pension scheme than men, and women aged 65-69 currently receive 72 % as much occupational pension income as men, compared with 61 % in 1994/95. The real difference between the take up of occupational pensions by women arises from the low take up by women working part-time of occupational pensions. Although the percentage of women working part-time who are members of occupational pension schemes has grown significantly over the last 15 years, it still remains low (in 1989 15 % of women working part-time were in their employer's pension scheme and in 2002 this had risen to 33 %),

*3. To what extent according to your estimation actuarial factors are used in this pillar?*

The use of actuarial factors are very common.

*4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?*

Defined benefit schemes are in sharp decline, particularly in the private sector. In 1995 there were about 5.2 million active members of private sector Defined Benefit schemes, and by 2000 about 4.6 million. The Pensions Commission best estimate is that active membership of open Defined Benefit schemes in the private sector has fallen by 60 % since 1995, and by 50 % since 2000.

5. In case of discriminatory benefits or discriminatory calculation of pension rights, the equalizing law in the United Kingdom did not provide for reconsideration of 'old' pensions, i.e. the new law did not have retroactive effect back to the date of the Barber Judgment in May 1990. At the time, the approach taken in the Pensions Act 1995 to issues of time limits and retrospection was criticized in several respects. Regarding discrimination in access to membership, a Labour amendment would have extended the remedy available to a person discriminated against back to 8 April 1976 (i.e. the date of *Defrenne II*), the possibility of which appears to have been contemplated in *Vroege* and *Fischer* (though these rulings also envisaged that claims could be subject to appropriate national time limits). Regarding other claims, Labour would have extended the remedy back to 17 May 1990 (i.e. the date of *Barber*). In both cases, this would have been longer than the two years backdating of remedies now provided under the Act.

### **III. The three pillar system as a whole**

1. To some extent the three-pillar system has been confirmed by the fact that different legal regimes have developed around the three pillars and this has affected the development of national practice to some extent.

2. The three pillar-based approach is conducive to the promotion of gender equality in so far as it permits different parts of the pensions and benefits area to move at different speeds and this results in the least progressive parts of the industry not holding up progress in the more progressive parts. It is, however, a hindrance to gender equality in so far as it leads to considerable complexity and a considerable blurring of the message of gender equality in this area.

## **Annex I: Questionnaire**

### **Report on Directive 79/7/EEC and Directive 86/378/EEC as amended by Directive 96/97/EC**

#### **A. Purpose**

The Commission services have engaged in a reflection on the impact of Directives 79/7/EEC and 86/378/EEC as amended by Directive 96/97/EC and on a possible modernization of the legal framework of these Directives.

According to the Roadmap for equality between women and men 2006-2010 it is essential that social protection systems ensure that women have access to adequate benefits, in particular when they retire. In this context the Commission was called on to assess how social protection systems can promote gender equality and to review the existing EU gender equality legislation not included in the 2005 recast exercise with a view to updating, modernizing and recasting where necessary.

The next report of the legal Experts is therefore intended to provide ideas, opinions and advices on the modifications that could be envisaged.

We would appreciate the final versions of the report for end of March 2007. It is estimated that the Report should comprise at about 5 to 6 pages per country.

Please hand in your report on 23 March 2007 at the latest to Sacha and Chantal as we must have sufficient time to put the report together and write the executive summary.

#### **B. Questions**

##### **I. Directive 79/7/EEC**

###### **a) General scope of the Directive**

1. Which sickness-, invalidity-, old age-, accidents at work-, and occupational diseases-scheme and which benefits in the national social security system of the Member State are to be considered as being part of the first pillar targeted by Directive 79/7/EEC (please list them)? If there are, according to Article 3 (1) (b) of Directive 79/7/EEC, social assistance schemes which intend to supplement or replace the schemes referred to above, please list them, too.

2. As regards the above mentioned schemes which are covered by the scope of Directive 79/7/EEC, what percentage of the population is covered by these schemes at issue (please differentiate following the different sectors of benefits covered)?

3. What are the main reasons to exclude people from receiving benefits although they fall within the scope of Directive 79/7/EEC (i.e.: are people excluded because they work in minor employment like in Case Nolte, C-317/93, in non-remunerated jobs, employment consisting in very few weekly hours or too short a period of employment)?

4. In which areas and to what extent especially woman are excluded from benefits, from access to the schemes or from more generous benefits?

6. How could this situation be amended?

###### **b) The exclusions mentioned in Article 3 (2) and Article 7 (1) of the Directive 79/7/EEC**

1. Article 3 (2) of the Directive provides that family benefits and survivors' benefits do not fall within the scope of the Directive. However, did the Member State nevertheless introduce the principle of gender equality in relation to these benefits?

2. Has the Member State excluded gender equality in relation to benefits, determination of pensionable age, advantages, etc. mentioned in Article 7 (1) of Directive 79/7/EEC? Please specify which benefits are excluded.

3. What effect do these exclusions have? In which domains are women treated differently from men (family benefits, survivor benefits etc.)?

4. Should these exclusions in your opinion be repealed? Please specify, which and why.

## **II. Directive 86/378/EEC as amended by Directive 96/97/EC**

1. Is it always possible to distinguish between statutory pension schemes (which are not related to pay or to a work-relationship) and occupational schemes (which are related to pay and to a work-relationship)?

2. What percentage of men and women in your country (gender-desegregated estimation) are covered by the second pillars targeted by Directive 86/378/EEC, i.e. occupational pension's system?

3. To what extent according to your estimation actuarial factors are used in this pillar? In this context it has to be observed that in general employees' contributions must be the same for men and women. But as regards employers' contribution to a defined-benefit scheme, these contributions might differ between the sexes. In a defined-benefit scheme the employer ensures that a female employee later receives a guaranteed monthly sum as pension. Taking into account the higher life expectancy of women it is possible that the employer has to contribute a higher sum for women than for men to this scheme. The same applies if in a defined-contribution scheme, where only the level of contributions paid every month is fixed, the aim is to equalize between the sexes the final amount which is paid as a pension (see in this context the exception provided for in Art 6 (1)(i) of Directive 86/378 and Case Neath, C-152/91).

4. Which tendency is prevailing in your country: defined-benefit schemes or defined-contribution-schemes?

5. Due to new jurisprudence as regards pensions of civil servants [Beune (C-7/93), Griesmar (C-366/99) and Niemi (C-351/00)], some member states had to adjust their retirement age and fix it at the same age for woman and men. Before these judgments, pensions for officials had been considered as belonging to the first pillar where differences are (still) allowed. In the wake of these judgments where it was ruled that these pension schemes belong to the second pillar, the retirement ages had to be equalized in the Member States. In case of discriminatory benefits or discriminatory calculation of pension rights, did the equalizing law in the Member State provide for reconsideration of 'old' pensions, i.e. did the new law have retroactive effect back to the date of the Barber Judgment in May 1990 (see Article 2 of Directive 96/97/EC)?

## **III. The three pillar system as a whole**

1. Is the three pillar system as a whole still a meaningful instrument to describe the different schemes in the Member States?

2. Presently, we have three sets of directives each broadly addressing one pillar of the social security system (79/9/EEC: first pillar and statutory schemes; 86/378 EEC as amended by 96/97/EC the second pillar and occupational security schemes; the new 2004/113/EC the third pillar and private insurances). Do you think that this pillar-based approach is rather conducive or rather a hindrance to gender equality?